85-1429

No. 85-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant,

v.

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.,

Appellees.

On Appeal from the Surpreme Court of Mississippi

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether *Miss. Code Ann.* § 11-3-23 (Supp. 1982), under which a mandatory penalty of fifteen percent of any money judgment is automatically imposed on an unsuccessful defendant-appellant, irrespective of the meritoriousness of the appeal, but which imposes no corresponding burden on the appeal of an unsuccessful plaintiff-appellant, whether frivolous or not, is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

2. Whether the award against appellant of $350,000 in punitive damages violates the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, and is otherwise invalid under the Due Process Clause of the Fourteenth Amendment, because it is disproportionate to actual damages, is vastly greater than any penalties prescribed by the Mississippi legislature for similar or analogous improper business activities, and constitutes an arbitrary and capricious taking of appellant's property unjustified by any rational state purpose.*

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* All parties to this case are named in the caption. Appellant American General Life and Accident Insurance Company is legally responsible for paying the judgment below, which was entered against the National Life and Accident Insurance Company. The name of the company known as National Life and Accident Insurance Company was changed to American General Life and Accident Insurance Company during the pendency of this case in the Supreme Court of Mississippi. Appellant is a wholly owned subsidiary of AGC Life Insurance Company which is, in turn, a wholly owned subsidiary of American General Corporation. Rule 28.1.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
A. Facts Relevant to the Constitutional Questions Presented	5
B. The Federal Questions Were Properly Presented	6
1. Presentation of the Federal Constitutional Challenge to *Miss. Code Ann.* § 11-3-23 (Supp. 1982)	6
2. Presentation of the Federal Constitutional Challenge to the Punitive Damage Award	8
C. The Questions Are Substantial	11
1. The Unconstitutionality of *Miss. Code Ann.* § 11-3-23 (Supp. 1982)	11
2. The Excessive Fines and Due Process Clause Question	13
CONCLUSION	16

TABLE OF AUTHORITIES

CASES: Page

Aetna Life Insurance Co. v. *Lavoie*, No. 84-1601 (argued Dec. 4, 1985) ..... *passim*

Colorado v. *Connelly*, No. 85-660 (cert. granted Jan. 13, 1986), 54 U.S.L.W. 3457 10

Cox Broadcasting Corp. v. *Cohn*, 420 U.S. 469 (1975) 3

Dewey v. *Des Moines*, 173 U.S. 193 (1899) 8

Henry v. *Collins*, 253 Miss. 34, 158 So.2d 28 (1963), *rev'd*, 380 U.S. 356 (1965) 9,10,11

Illinois v. *Gates*, 462 U.S. 213 (1983) 6,8-9

Life and Casualty Insurance Company of Tennessee v. *Bristow*, No. 18,556 (Cir. Ct. Lee Cty, Miss. Feb. 6, 1986) 15

Lindsey v. *Normet*, 405 U.S. 56 (1972) 12,13

New York Times v. *Sullivan*, 376 U.S. 254 (1964) 9, 10

Smith v. *Wade*, 461 U.S. 30 (1983) 11

Spaeth v. *Union Oil Company of California*, 762 F.2d 865 (10th Cir.), No. 85-550 (pet. for cert. filed Sep. 30, 1985) 10

Stanley v. *Illinois*, 405 U.S. 645 (1972) 9

Wallace v. *Jones*, 360 So.2d 932 (Miss. 1978) 7,8,12

Walters v. *Inexco Oil Co.*, 440 So.2d 268 (Miss. 1983) 13

CONSTITUTION, STATUTES AND RULES:

FEDERAL CONSTITUTIONAL PROVISIONS:

First Amendment 9

Eighth Amendment, Clause 2 (Excessive Fines Clause) ..... *passim*

Table of Authorities Continued

Page

Fourteenth Amendment, Section 1 (Due Process Clause) ..... *passim*

Fourteenth Amendment, Section 1 (Equal Protection Clause) ..... *passim*

FEDERAL STATUTE:

28 U.S.C. Section 1257 (2) 3

STATE STATUTES AND RULES:

Section 11-3-23, *Mississippi Code Annotated* (Supp. 1982) ..... *passim*

Section 75-17-7, *Mississippi Code Annotated* (Supp. 1982) 13

Section 83-17-1, *Mississippi Code Annotated* (1972) 14

Rule 14, Rules of the Supreme Court of Mississippi 3

Rule 19, Rules of the Supreme Court of Mississippi 3

Section 12-22-72, *Code of Alabama* (1975) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant,

v.

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.,

Appellees.

On Appeal from the Surpreme Court of Mississippi

JURISDICTIONAL STATEMENT

Appellant, American General Life and Accident Insurance Company, appeals from the final decision and order of the Supreme Court of Mississippi dated November 13, 1985, affirming a judgment of the Circuit Court of Forrest County awarding $352,500.00, plus interest and costs, and imposing a mandatory penalty of fifteen percent additional damages on appellant pursuant to *Miss. Code Ann.* § 11-3-23 (Supp. 1982); and, the order of the Supreme Court of Mississippi dated December 4, 1985, denying appellant's Petition for Rehearing and overruling appellant's Motion to

Correct Mandate, both of which sought reconsideration of that court's November 13, 1985 decision and order. The decision and orders of the Supreme Court of Mississippi have denied appellant protections guaranteed to it by the Excessive Fines Clause of the Eighth Amendment as made applicable to the States by the Due Process Clause of the Fourteenth Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi dated November 13, 1985, with opinion specially concurring, is reproduced in App. A, *infra*, 1a, and is unreported. The order of the same date of that court affirming the trial court's judgment and assessing a fifteen percent penalty against appellant is reproduced in App. B, *infra*, 22a, and is unreported. The order of the Supreme Court of Mississippi dated December 4, 1985, denying appellant's Petition for Rehearing and overruling appellant's Motion to Correct Mandate, is reproduced in App. C, *infra*, 23a, and is unreported. The order and judgment of the Circuit Court of Forrest County, dated November 19, 1982, is reproduced in App. D, *infra*, 24a, and is unreported. The Circuit Court of Forrest County issued no opinion.

JURISDICTION

The November 13, 1985 decision and November 13 and December 4, 1985 orders of the Supreme Court of Mississippi necessarily upheld, *sub silentio*, *Miss. Code Ann.* § 11-3-23 (Supp. 1982), against appellant's claim under the Equal Protection Clause of the Four-

teenth Amendment that § 11-3-23 is unconstitutional. The November 13, 1985 order assessing a fifteen percent penalty against appellant issued automatically as a consequence of the November 13, 1985 decision of the Supreme Court of Mississippi affirming the judgment of the trial court. It was not a part of any appealable judgment until that time. Accordingly, and consonant with accepted Mississippi practice, appellant's federal constitutional challenge to this statute was properly presented in appellant's Petition for Rehearing, and Brief in Support of Petition for Rehearing, dated November 26, 1985, App. E, *infra*, 26a, and in appellant's Motion to Correct Mandate and Brief in Support of Motion to Correct Mandate, dated November 26, 1985, App. F, *infra*, 39a.[1]

A Notice of Appeal of this case to this Court was timely served and received by the court below on January 22, 1986 App. G, *infra*, 48a. This Court has jurisdiction of this case under 28 U.S.C. § 1257(2). Question 2 was duly presented to the Supreme Court of Mississippi and may be decided with this appeal. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

This appeal is being docketed in this Court within 90 days from the order of the Supreme Court of Mississippi on December 4, 1985, denying appellant's Petition for Rehearing and overruling appellant's Motion to Correct Mandate.

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[1]Appellant filed both a Petition for Rehearing, pursuant to Mississippi Supreme Court Rule 14, and a Motion to Correct Mandate, pursuant to Mississippi Supreme Court Rule 19, because of a perceived ambiguity in the proper application of those rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

2. The Excessive Fines Clause of the Eighth Amendment of the Constitution provides, in pertinent part, that:

> [N]or [shall] excessive fines [be] imposed . . . .

3. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> [N]or shall any State deprive any person of . . . property, without due process of law . . . .

4. Section 11-3-23 of the Mississippi Code Annotated (Supp. 1982) provides, in pertinent part, that:

> In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the Supreme Court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment be for a sum of money, the damages shall be upon such sum . . . .

STATEMENT OF THE CASE

Appellant seeks plenary consideration of its contentions that a judgment imposing $350,000 in pu-

nitive damages for failure to pay a $2,500 insurance claim, and the addition of a mandatory fifteen percent penalty on that judgment under *Miss. Code Ann.* § 11-3-23 (Supp. 1982), for the failure to prevail on appeal, have deprived appellant of substantial rights guaranteed by the provisions of the Constitution of the United States enumerated above. The constitutional issues presented are substantial and are intimately related to similar questions already pending before this Court in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (argued Dec. 4, 1985). These issues, as the following discussion demonstrates, were timely and properly raised below.

A. Facts Relevant to the Constitutional Questions Presented

In April of 1981, appellees applied to appellant for the issuance of a $2,500 insurance policy on the life of their six year old son. App. A, *infra*, 2a . The application, signed by both appellees, denied that appellees' son had ever consulted with or been treated by a doctor for heart disease or that, for any reason, he had in the previous five years consulted with or been treated by a doctor. App. A, *infra*, 2a .

When, after the policy was issued, appellant's agent returned a few months later to appellees' home to collect the premium, he was told by appellees that their son had died during open heart surgery in July of 1981. App. A, *infra*, 2a-3a .

Appellant's Home Office investigation of appellees' claim revealed that the insured had been born with a congenital heart defect, that he had been hospitalized several times for that condition, and that, throughout his life, he had never been released from

the care of a physician. Appellant accordingly denied the claim on the basis of appellees' materially false statements on the application. App. A, *infra*, 3a .

At the trial of appellees' action to recover the face amount of the policy and punitive damages for bad faith refusal to pay the insurance claim, the evidence revealed that appellant's sales agent and staff manager had been told during their initial visit with one of the appellees that her son had a heart murmur. App. A, *infra*, 2a . Evidence was also introduced that suggested that they may also have been told of the insured's prior hospitalizations. App. A. *infra*, 5a . Nevertheless, this information was not included on the application signed by appellees, and it was apparently deliberately withheld from appellant by its agents until after the claim was denied and litigation commenced. App. A, *infra*, 7a .

On November 19, 1982, the jury returned a verdict against appellant of $2,500 for the face amount of the life insurance policy and $350,000 in punitive damages on the bad faith claim.

B. The Federal Questions Were Properly Presented

Appellant recognizes its burden of persuading this Court that it has jurisdiction over this appeal in the absence of any express consideration or resolution by the court below of the federal questions presented here. *Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983).

1. Presentation of the Federal Constitutional Challenge to *Miss. Code Ann.* § 11-3-23 (Supp. 1982)

Question 1, challenging the constitutionality of *Miss. Code Ann.* § 11-3-23 (Supp. 1982), was presented for the first time in appellant's Petition for Rehearing and its Motion to Correct Mandate, as well as the

briefs filed in support of those pleadings. Apps. E and F, *infra*, 26a, 35a-37a. This was the appropriate and logical time for appellant to present its constitutional challenge to that statute because there was no issue concerning the statute, nor any judgment or appealable order reflecting the application of that statute to appellant, prior to the issuance by the Supreme Court of Mississippi of its November 13, 1985 decision and order.

That appellant's challenge to § 11-3-23 was both timely and proper under Mississippi practice is established by the disposition of a similar challenge to that same statute by the Supreme Court of Mississippi in *Wallace* v. *Jones*, 360 So.2d 932 (Miss. 1978). The opinion in that case addresses at length the merits of a challenge to the constitutionality, under the Equal Protection Clause of the Fourteenth Amendment, of § 11-3-23. As is clear from the face of the opinion in *Wallace* v. *Jones*, the constitutionality of § 11-3-23 was raised after the affirmance of the trial court's judgment by the Supreme Court of Mississippi in the context of a "Motion to Correct Judgment."[2]

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[2]Examination of the pertinent portions of briefs filed in *Wallace* shows that the challenge to § 11-3-23 was first raised in the appellant's brief in opposition to the appellee's post-affirmance motion for imposition of the statutory penalty. Pertinent portions of the briefs in *Wallace* are reprinted in App. H, *infra*, 50a-61a . That a challenge to § 11-3-23 is appropriately raised in a post-judgment motion in the court below is substantiated by appellees' Brief in Opposition to appellant's Motion to Correct Mandate. App. I, *infra*, at 62a-67a . While that brief is replete with arguments addressing the merits of appellant's challenges to the judgment based on the Excessive Fines Clause, Due Process Clause and Equal Protection Clause, it nowhere suggests that the manner in which appellant raised them was untimely.

Accordingly, the action of the Supreme Court of Mississippi denying appellant's Petition for Rehearing and overruling appellant's Motion to Correct Mandate without opinion must be deemed as implicitly upholding the constitutionality of § 11-3-23. In any event, in view of that court's decision in *Wallace* v. *Jones* and, indeed, in the absence of any objection to its entertaining appellant's arguments on the merits, note 2, *supra*, its rulings were presumptively *not* based on any failure properly to present this question.

2. Presentation of the Federal Constitutional Challenge to the Punitive Damage Award

Appellant first challenged the excessiveness of the punitive damage award in its post-trial Motion for Judgment, Corrected Judgment, or New Trial, App. J, *infra*, 71a, as well as in its Brief and Reply Brief on direct appeal to the Supreme Court of Mississippi, App. K, *infra*, 109a-110a, 123a . Appellant's argument addressing the excessiveness of the punitive damages award was renewed by appellant on November 26, 1985, in its Petition for Rehearing and brief in support thereof which, for the first time, made express reference to the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment. App. E, *infra*, 32a . The argument there advanced is indistinguishable from the one advanced post-trial and on direct appeal, and hence, was merely "an enlargement of the one mentioned," *Dewey* v. *Des Moines*, 173 U.S. 193, 197 (1899), in its earlier pleadings. It is, therefore, "so connected with it in substance as to form but another ground or reason for alleging the invalidity" of the November 19, 1982 judgment of the trial court. *Id.*, at 197-98. *See generally Illinois* v. *Gates*, 462 U.S.,

at 219-20; 248-50 (White, J., concurring in the judgment); *Stanley* v. *Illinois*, 405 U.S. 645, 658 n.10 (1972).

In addition, this Court has not hesitated in the past to apply newly announced constitutional rules governing the imposition of damages under state tort law to cases which were decided by the highest court of a state prior to this Court's announcement of such a new constitutional rule. For example, in *Henry* v. *Collins*, 253 Miss. 34, 158 So.2d 28 (1963), a libel judgment was affirmed by the Supreme Court of Mississippi on December 2, 1963. On March 9, 1964, this Court handed down its decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), in which it held, for the first time, that state common law libel actions were subject, in important particulars, to the proscriptions of the First Amendment. On May 15, 1964 a petition for writ of certiorari to the Supreme Court of Mississippi was filed in this Court in *Henry* v. *Collins*. On March 29, 1965, this Court granted that petition for certiorari and reversed the judgment in *Henry*, holding that the instructions read to the jury (which were apparently not objected to by the petitioner at trial),[3] could have been understood by

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[3] The petition for writ of certiorari filed in *Henry* v. *Collins* made no references at all to the instructions read to the jury, and this Court, in its opinion, did not suggest that the instructions were objected to by the petitioner or that the petitioner had requested, but was denied, different instructions which would have complied with the rule subsequently laid down in *New York Times Co.* v. *Sullivan*. In *Henry*, as here, defendants cannot be expected to possess the clairvoyance necessary to anticipate significant constitutional rulings of this Court which may, as applied to their cases, require reversal of the judgments against them.

the jury as permitting recovery on a showing that did not meet the constitutional standards established in *New York Times Co.* v. *Sullivan*. *Henry* v. *Collins*, 380 U.S. 356 (1965)(per curiam).

If this Court reaches and decides in the appellant's favor in *Aetna Life Insurance Co.* v. *Lavoie* either Questions 1 or 4 as presented by the appellant in that case, the judgment in this case should be vacated accordingly. If, on the other hand, this Court for whatever reason does not reach either Questions 1 or 4 in *Aetna*, this appeal should be noted, or held pending this Court's disposition of any other cases on its docket which, in the Court's view, may be suitable for decision of the Excessive Fines Clause issue raised in *Aetna* and this appeal.[4] If this Court holds the Excessive Fines Clause (or Due Process Clause) to control the award of punitive damages in civil actions, then that new constitutional rule should be extended

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As illustrated by this Court's action in reversing the judgment below in *Henry*, it is enough if this Court has before it a record sufficient to demonstrate that the judgment before it is inconsistent with its newly announced constitutional rule.

[4] For example, a case presently on this Court's docket raises, on its facts, the Excessive Fines Clause question argued to this Court in *Aetna* and presented in this appeal. *Union Oil Company of California* v. *Spaeth*, No. 85-550 (pet. for cert. filed Sep. 30, 1985). Although petitioner Union Oil Company of California has not presented an Excessive Fines Clause question in its petition, it is clear that the excessiveness of the $2,000,000 punitive damage award in that case was the only issue argued to the Tenth Circuit, *Spaeth* v. *Union Oil Company of Califonia*, 762 F.2d 865, 866 (10th Cir. 1985), and that this Court possesses the power to grant the petition in that case and request the parties to brief and argue the Excessive Fines Clause question. *See, e.g.*, *Colorado* v. *Connelly*, No. 85-660 (cert. granted Jan. 13, 1986), 54 U.S.L.W. 3457.

to all pending litigation in which punitive damages have been sought, as in *Henry* v. *Collins*, *supra*. This is especially true in light of the "windfall" nature of punitive damage awards, *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting), and the absence of any significant state interest in meting out punishment "based upon the caprice and prejudice of jurors." *Id.*

C. The Questions Are Substantial

1. The Unconstitutionality of *Miss. Code Ann.* § *11-3-23* (Supp. 1982)

Under *Miss. Code Ann.* § 11-3-23 (Supp. 1982), litigants who unsuccessfully appeal from money judgments are automatically penalized an additional fifteen percent of the original judgment. Although most States have in place, by statute or rule, mechanisms designed to deter frivolous appeals, Mississippi is apparently the only State, other than Alabama, to impose a non-discretionary, mandatory penalty upon affirmance of a money judgment without regard to the novelty or complexity of the factual or legal issues presented in a particular appeal. The constitutionality of Alabama's statute, § 12-22-72, *Code of Alabama* (1975), is presently *sub judice* in this Court in *Aetna Life Insurance Co.* v. *Lavoie*, *supra*.

If § 11-3-23 is designed to prevent frivolous appeals, it is both indiscriminately overinclusive and unreasonably severe, because it punishes those who pursue non-frivolous appeals. At the same time, it is irrationally underinclusive because a plaintiff who fails to recover a money judgment at trial may take an unsuccessful appeal on wholly frivolous grounds without risk of any penalty whatsoever.

In a prior challenge to the constitutionality of § 11-3-23, the Supreme Court of Mississippi upheld the statute against a challenge based on the Equal Protection Clause on the ground that, on its face, the statute imposes a penalty on any unsuccessful appellant—whether plaintiff or defendant—where the judgment appealed from permits recovery. In other words, the court reasoned that a losing plaintiff-appellant is spared the imposition of this mandatory penalty because there is no judgment on which to compute and impose the penalty. *Wallace* v. *Jones*, 360 So.2d, at 933-34. This reasoning is transparently insufficient to sustain § 11-3-23; the fact that the Mississippi legislature found it convenient to punish losing appellants raising substantial legal issues on appeal from a money judgment against them by reference to a percentage of that money judgment does not constitutionally excuse that legislature from treating all losing appellants in an even-handed fashion in fulfilling the legitimate objective of the State to curb frivolous or dilatory appeals.

Appellant submits that § 11-3-23 is simply irreconcilable with, and must be struck down under, the reasoning of *Lindsey* v. *Normet*, 405 U.S. 56 (1972). In *Lindsey*, this Court invalidated an Oregon statute that required a particular class of losing defendants, tenants, to post a double bond in order to appeal from a judgment in favor of their landlord. Under the Oregon Forceful Entry and Wrongful Detainer Statute, if a lower court judgment in favor of a landlord were affirmed on appeal, there was automatically imposed on the losing tenant "twice the rents occurring during the appeal without proof of actual damage . . . ." *Id.*, at 76. Like the Mississippi statute at issue here, the

Oregon statute discouraged meritorious as well as frivolous appeals. *Id.*, at 78.

The discrimination visited upon defendant-appellants by § 11-3-23 is not counterbalanced in the Mississippi court system by any other statutory provision or judicial power to punish and deter wholly frivolous appeals mounted by plaintiffs who fail to recover money judgments. Mississippi simply "makes no effort to limit the right of appeal, e.g., to cases where appellant proceeds in good faith . . . ." *Walters* v. *Inexco Oil Co.*, 440 So.2d 268, 275 (Miss. 1983). The statute is, moreover, unnecessary and irrelevant to compensating winning appellees for any delay in the payment of money judgments rendered. That legitimate objective is provided for by a statute under which interest is imposed on a money judgment from the date of its entry. *Miss. Code Ann.* § 75-17-7 (Supp. 1982). In sum, § 11-3-23 operates as an arbitrary and capricious barrier to the exercise of the statutory right of appeal for any losing defendant who cannot afford the risk of the penalty, and as an arbitrary and capricious punishment to defendants who take a non-frivolous appeal from a money judgment but who do not prevail on that appeal. The statute is plainly not "reasonably tailored" to discourage potentially insubstantial appeals, nor is it "uniformly and non-discriminatorily applied." *Lindsey* v. *Normet*, 405 U.S., at 78.

2. The Excessive Fines and Due Process Clause Question

The question whether the Excessive Fines Clause applies to a punitive damage award that is grossly disproportionate to the conceded actual harm is presently *sub judice* in this Court in a similar case, *Aetna Life Insurance Co.* v. *Lavoie*, *supra*. The court below stated simply, and correctly, that the purpose of pun-

itive damages is "to provide punishment and deterrence," noting that "the amount is solely within the jury's discretion . . . ." App. A, *infra*, at 18a.

The punitive damage award here, $350,000, is 140 times the actual damage award. Had appellant been charged under Mississippi criminal statutes governing fraud in the procurement of payment or obligation for payment of insurance premiums, and found guilty thereunder, appellant would have been assessed a maximum fine of $500. *Miss. Code Ann.* § 83-17-1 (1972). Of course, appellant was *not* charged with any infractions of Mississippi's criminal laws; instead, appellant was sued for failure to perform a $2,500 contractual obligation. As a consequence, appellant has been severely punished by the courts of Mississippi, and without any of the protections of the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment to which it would have been entitled in a criminal prosecution instigated for the same conduct. Whether such excessive punishment—unrelated to the actual harm allegedly done—may be imposed under the Excessive Fines Clause of the Eighth Amendment as made applicable to the States by the Due Process Clause of the Fourteenth Amendment presents a substantial question that should be addressed by this Court in this case.

Whether addressed under the Excessive Fines Clause or directly under the Due Process Clause of the Fourteenth Amendment, the gross disproportionality of the fine in this case, exacerbated by the magnifying effect of the additional fifteen percent penalty imposed by § 11-3-23, presents a substantial federal question. There is no state interest in permitting the recovery of this excessive fine. Such irrational pen-

alties cannot and will not deter decisionmaking and conduct such as that at issue in this case, because no insurer in appellant's position can determine what conduct it must avoid in the course of performance of its contractual duties so as to avoid the imposition of severe and unpredictable fines. If such awards deter anything, it is the writing of life and other insurance contracts at reasonable costs to insureds. The only objective that unforeseeable and disproportionate punitive damages will achieve is to increase underwriting costs, and hence premiums, in the provision of insurance.

The decision below is neither an aberration nor the most shocking example of arbitrary, capricious and uncontrolled punitive damage awards in Mississippi. Another Mississippi jury recently awarded $6,000,000 in punitive damages in a case in which the plaintiff was compensated for its alleged actual damages by a separate award of $50,000.[5] That case is currently on appeal to the Supreme Court of Mississippi. In the absence of a decision by this Court holding that the Excessive Fines Clause controls the size of punitive damage awards, the court below will once again be free to defer to the jury's unbridled discretion.

This Court has the power and responsibility under the Eighth Amendment to place constitutional restraints on such arbitrary awards and to stem the tide of proliferating verdicts such as these. The punitive damages award here is excessive both in kind, because it serves no valid state purpose, and in de-

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[5] *Life and Casualty Insurance Company of Tennessee* v. *Bristow*, No. 18,556 (Cir. Ct. Lee Cty, Miss. Feb. 6, 1986). *See* App. L, *infra*, 125a.

gree, because it is grossly disproportionate to the actual damages.

CONCLUSION

Appellant's federal constitutional claims are substantial. It has been fined in an amount vastly out of proportion to the actual damages it was found to have caused in a case in which its conduct was based upon false information provided to it by the very parties suing it for bad faith. Its punishment has been imposed without any of the limits or protections that it would have enjoyed in a criminal proceeding in which its penalty would have been far less. And, that result has been exacerbated by the non-discretionary imposition of an additional penalty, further multiplying the injustice, merely for exercising its right, in a legally and factually complex case, to appeal the judgment of the trial court. This Court is already addressing these issues in a similar context in *Aetna Life Insurance Co.* v. *Lavoie*. This case should be held pending the Court's resolution of these issues in the *Aetna* case. If the Court does not reach these issues in *Aetna*, probable jurisdiction should be noted and this case set for argument.

Respectfully submitted,

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February 26, 1986

APPENDIX

CONTENTS

Appendix to Jurisdictional Statement on Appeal From the Supreme Court of Mississippi

APPENDIX A 1a

Opinion of the Supreme Court of Mississippi affirming the judgment of the trial court (Nov. 13, 1985)

APPENDIX B 22a

Order of the Supreme Court of Mississippi affirming the trial court's judgment assessing the statutory 15% penalty, and awarding interest and costs (Nov. 13, 1985)

APPENDIX C 23a

Order of the Supreme Court of Mississippi denying Petition for Rehearing and overruling Motion to Correct Mandate (Dec. 4, 1985)

APPENDIX D 24a

Judgment and Order of the Circuit Court of Forrest County, Mississippi, Nov. 19, 1982)

APPENDIX E 26a

Petition for Rehearing and Brief in Support (Nov. 26, 1985)

APPENDIX F 39a

Motion to Correct Mandate and Brief in Support (Nov. 26, 1985)

APPENDIX G 48a

Notice of Appeal (Jan. 22, 1986)

CONTENTS—continued

APPENDIX H 50a

Relevant appellate pleadings in *Wallace* v. *Jones:* Appellant's Assignment of Errors (received and filed June 27, 1977); Appellee's Brief in Support of Motion for Statutory Penalty (served May 30, 1978); and Appellant's Opposition to Motion for 5% Damages (served June 2, 1978)

APPENDIX I 62a

Answer of Appellees to Motion to Correct Mandate and Brief in Support (Dec. 2, 1985)

APPENDIX J 68a

Motion for Judgment, Corrected Judgment or New Trial (Nov. 19, 1982)

APPENDIX K 74a

Appellant's Brief and Reply Brief in the Supreme Court of Mississippi (June 1, 1983 and July 1, 1983)

APPENDIX L 125a

Verdict in *Life & Casualty Insurance Company of Tennessee* v. *Bristow* (Circuit Court of Lee County, Mississippi Oct. 11, 1985)

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 54,702

Decided November 13, 1985

NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY

v.

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.

Before Patterson, Dan Lee and Sullivan

Dan Lee, Justice, for the Court:

This appeal comes to us from the Circuit Court of Forrest County wherein Carolyn Miller and Marvin Ramsey Miller, Sr., the appellees, received a judgment against the appellant, National Life and Accident Insurance Company, in the amount of $352,500. The Millers had filed suit against National claiming that National had failed to pay on a life insurance policy the Millers had purchased covering their son, Marvin Ramsey Miller, Jr. In addition to the policy limits, the Millers also sought punitive damages for what they alleged to be National's bad faith refusal to make payment due under the policy. Following the trial and the rendition of the aforementioned judgment against it, National now brings this appeal. We have carefully studied the record and briefs of counsel in this cause and found no reversible error. We therefore affirm.

THE FACTS

The first witness produced at trial was Lavern Dillon, an agent for National, who was called adversely by the Millers. Dillon had worked for National since August, 1980. He testified that he had received information that the Millers desired to purchase some insurance so he and his staff man-

ager, Joe Blount, called on them. Mr. Miller was not at home so Blount and Dillon discussed insurance with Mrs. Miller. She agreed to purchase a life insurance policy from National covering her and her husband for $5,000 and their child for $2,500.

In filling out the application, Blount held it in his hand and read the questions to Mrs. Miller. The only thing Mrs. Miller did was to sign the application. This was on April 9, 1981. Because Mr. Miller had not been at home, Blount and Dillon left the application with Mrs. Miller and Blount returned the next day to pick it up after Mr. Miller had signed it.

Dillon testified that in filling out the application for insurance, question 26(b) asks: "Has any proposed insured (or provider) ever consulted with or been treated by a doctor for, or been told by a doctor he had disease of the heart, blood, lungs, kidneys, digestive system or brain or nervous system?" Dillon stated that Mrs. Miller told them that her child had a heart murmur. Instead of recording Mrs. Miller's response, Blount answered the questions by marking a box labeled "No." Question 24 asked "Has any proposed insured (or provider) within the past five years consulted with or been treated by a doctor, or been confined to any hospital?" Again, Blount marked the "No" box; however, Dillon testified that Mrs. Miller told them that the child had been treated by a doctor for the heart murmur and had been in the hospital within the last five (5) years.

Dillon testified that he knew that it was important to furnish the correct information on the application. He stated that he did not consider a heart murmur significant and thought that it was only an irregular beat. At that time, he saw no harm in omitting the information from the application. He testified that he knew that he and Blount had not accurately recorded Mrs. Miller's responses.

The child died during open heart surgery on July 22, 1981. Approximately one and one-half to two months after

that, Dillon called on the Millers to collect the premium. At that time the Millers told him of their son's death. Dillon assisted them in filling out the appropriate papers to make a claim on the policy. On October 5, 1981, Dillon received a letter from Blount's superior, Martin Brashier, National's District Manager. Brashier was simply forwarding the letter from the Company's home office in Nashville, Tennessee. That letter inquired whether all of the questions on the application had been asked and answered as recorded. Dillon replied that they had been. The letter also asked who was present at the time of the taking of the application. Dillon replied that only he and Mrs. Miller were present. Finally, the letter asked if Dillon had any knowledge of the child's heart condition. Dillon responded that he did not. Dillon gave the letter and his responses to Blount who forwarded them to the home office.

A second letter from the home office to Dillon on November 16, 1981, requested further information. That letter inquired of Dillon whether the Millers had discussed their problems with him. Dillon replied that they had not. The letter also asked if he had any idea why the Millers thought that he was aware of their child's heart condition. Dillon replied that he had no idea. This letter and Dillon's responses were also forwarded to the home office through Blount.

In December, 1981, National decided not to pay the claim because its investigation revealed that the child had been born with a congenital heart defect and had been hospitalized many times for treatment of that condition. National's position was that the Millers had made false statements on the application for insurance. Dillon testified that he and Blount had discussed four or five times the fact that Mrs. Miller had mentioned the heart murmur to them. He had also discussed it with Brashier three or four times. Nonetheless, Dillon never attempted to notify anyone else in the company that the responses recorded on the application were not the responses Mrs. Miller gave them.

At trial, the Millers introduced a transcript of a tape recorded conservation between Mrs. Miller and Dillon. The call was placed from the Millers' attorney's office and Dillon was unaware that it was being recorded. In that conversation, Mrs. Miller sought information about why it was taking so long to process her claim. Several times in the conversation Dillon told her to "Just say it like you said, say that you told me about it . . ." Dillon stated "Right, yes, mam, I remember you telling me. I mean if I say I did not know it, then they could, could still go ahead and deny the claim." Dillon went on to say, "Just tell them the truth, that you told me about it, everything about it. That's all I need you to do." Mrs. Miller then asked, "Okay, and you say you are going to tell them what?" To which Dillon replied, "That I didn't know about it." Mrs. Miller then asked, "Oh! and this is supposed to help me, right?" To which Dillon stated, "Right, yes, mam its supposed to help you out."

Following the introduction of the transcript of the tape recorded conversation, Dillon testified that he now denies that Mrs. Miller had told him about the child having been treated in the hospital within the last five years. He stated that his admonition to her to tell "Everything" referred only to what he thought was an insignificant heart murmur.

Dillon was recalled to the stand as a defense witness. At that time he testified that his salary was based on a commission from his sales. He then again denied that Mrs. Miller had told him about the child having been in the hospital. He also denied that she had mentioned that the child had had surgery. He stated that in his responses to the company inquiries about his knowledge, he "didn't put a lot of thought into them."

On cross-examination Dillon stated that National had no claims department in Mississippi. They got all of their claims information from their soliciting agents. Part of his duties included helping to adjust claims. He admitted that

when he testified as an adverse witness he had stated that Mrs. Miller had told him about the heart murmur. He also admitted that when testifying at that time he stated that Mrs. Miller had told him about the child's doctors treatments and hospitalizations. He then denied that those responses were true.

Dillon testified that he knew Mrs. Miller relied on him to help settle her claim. He also stated that he, Blount and Brashier all knew that his responses to the company's inquiries concerning his knowledge misrepresented the truth.

Carolyn Miller testified after Dillon. She is a dietary aide who has never finished high school. The child in question had been born with a heart defect that the physicians described to her only as a "murmur." They never referred to the child's condition by any other name to her. Through the six (6) years of the child's life he was never released from a doctor's care. He had had a heart catherization when first born and many subsequent hospitalizations.

Mrs. Miller testified that she and her husband decided that they needed some insurance so she asked at work if anyone there could advise her on an insurance company. A friend recommended National Life. Her friend asked Dillon to call on Mrs. Miller. As a result, Dillon and Blount came to Mrs. Miller's home. Mrs. Miller testified that she answered all of the questions on the application honestly. She told Blount and Dillon about the heart murmur and the child's having been under a doctor's care. She also told about the hospitalization and the surgery he had had. Mrs. Miller stated that Blount held the application, read the questions and filled in the responses.

When Dillon came by the Miller home to pick up the insurance premium, after the child died, Mrs. Miller informed him of the death. Mrs. Miller testified that Dillon helped her fill out some papers and then after that he appeared to be avoiding her.

On cross-examination, Mrs. Miller testified that she knew that her son's heart condition was serious. She admitted signing the application and stated that she now knows that the application contains incorrect information. She testified that she did not know the application had been filled out wrong until sometime in November or December when the insurance company refused to pay on the policy. She stated that she had never read over the application and had surrendered it and the policy to Dillon when she first told him of her son's death. She testified that she was led to believe that Dillon was taking care of everything for her and that she did not know anyone else in the insurance company to contact.

Marvin Miller, Sr. testified that he was twenty-seven (27) years old, and had only been through the ninth grade. He could read and write only poorly. Miller testified that he was not present when Dillon and Blount came to his home. His wife gave him the application to sign the next morning and he did so without reading it. Following Mr. Miller's testimony, the Millers rested their case.

Dillon had been named as a defendant; however, after the Millers rested the trial court granted a directed verdict for Dillon. A motion to dismiss as to Carolyn Miller because Marvin Miller was the policyholder was overruled.

Following Lavern Dillon's further examination, Joe Blount was called to the stand. He testified that he was Dillon's superior. He stated that he and Dillon had authority only as soliciting agents and had no authority to bind a contract. Blount stated that he asked the questions on the application to Mrs. Miller and filled out the responses. He denied that Mrs. Miller had told them about the child having been in the hospital.

After a claim had been made on the policy, Blount received an inquiry from Brashier and forwarded it to Dillon. He admitted that he reviewed Dillon's responses. He did the same with the second inquiry.

Blount testified that he had had a heart murmur at birth and that he considered the situation insignificant. He particularly thought it insignificant because he stated that Mrs. Miller did not tell them about any further medical treatment in relation to it.

Blount admitted that he never made a statement to the company's home office that he was aware of the heart murmur. He also never informed the home office that he had been present at the time of the taking of the application. He was aware of the misrepresentations made by Dillon in Dillon's responses to the company's inquiries. Blount also knew that had he recorded the heart murmur on the policy it was likely that the company would have investigated the child's hospital and medical records and determined not to insure the child. Blount testified that he had discussed the situation with Brashier three to four times. He did not discuss the situation with National's attorneys until two weeks before the trial because those attorneys had not made any inquiry of him prior to that period.

Although Blount had testified that he was only a soliciting agent, he stated that he did help to handle claims and assist in their processing. He stated that Brashier and Dillon did likewise.

Martin Brashier, the District Manager for National, testified that he did not discuss the heart murmur with either Dillon or Blount. Later, in an ambiguous response Brashier stated that although he didn't go over the facts of the situation with Dillon, he did talk with him about it. Brashier stated that he was aware that at the very least Mrs. Miller had told Blount and Dillon that the doctors had discovered a "noise" in the child's chest at birth. He testified that he never relayed this information to the claims department. Although he assisted in providing claims information he never told the claims department about the murmur after he learned of it.

Benton Shoemake, National's second Vice-President in charge of underwriting, testified that had the company known the truth the child would have been denied coverage. He admitted that had he denied coverage to the child, the Millers would have sought all of their insurance from another company. Shoemake testified that the company only learned two weeks before trial that its agents knew of the heart murmur. In Shoemake's opinion the policy had been mishandled from the date of the application.

Following Shoemake's testimony the defense rested and the jury was provided information on National's annual wealth. Thereafter, upon being instructed as to the law, the jury returned a verdict for the Millers in the amount of $2,500 actual damages and $350,000 punitive damages.

DID THE TRIAL COURT ERR IN SUBMITTING THE ISSUE OF PUNITIVE DAMAGES TO THE JURY?

We begin this discussion by addressing National's assertion that the Millers knew that their application for insurance contained false information and as a result the insurance company had a judicial reason and therefore an arguable basis for denying the claim. Both agents Dillon and Blount testified that Mrs. Miller told them that her child had suffered a heart murmur. Although Blount denied that they were told the child had been hospitalized, Dillon stated that they were given that information. Later in the course of the trial Dillon retracted his statement and denied that they had been told that the child had been hospitalized. Regardless, both agents admitted knowing of the heart murmur. They failed to note that on the application or explain it in the space provided on the application. Both Dillon and Blount were aware that they had been responsible for filling out the application and that Mrs. Miller was relying on them to record her responses. Whether Mrs. Miller disclosed her child's hospitalization may have been a question of fact; however, there was no issue of fact as to whether

she disclosed the heart murmur. Both Dillon and Blount testified that she had informed them of the murmur. In *World Insurance Co. v. Bethea,* 230 Miss. 765, 93 So.2d 624 (1957), this Court quoted from an earlier decision, *Planters Insurance Co. v. Myers,* 55 Miss. 479 (1877):

> We adopt the doctrine of those cases which hold that, if the agent takes charge of the preparation of the application, or suggests or advises what shall be answered, or what shall be a sufficient answer, the company shall not avoid the policy because they are false or untrue, if full disclosures were made by the applicant to him.

Not only did Blount and Dillon take charge of the preparation of the application, but, they made the decision, independent of Mrs. Miller, not to record the information about the heart murmur. Under the law of this state National cannot avoid the policy because the application for insurance did not fully disclose information given to its agents. The failure of the application to contain all of the information relayed by Mrs. Miller to Dillon and Blount does not constitute an arguable basis for denying the claim. See, *Bankers Life Insurance v. Crenshaw,* No. 54,123, decided September 11, 1985, not yet reported.

National next asserts that the knowledge gained by Dillon and Blount while taking the application from Mrs. Miller cannot be imputed to it because they were merely soliciting agents. That position is contrary to the law of this state as defined both by statute and case law. Miss. Code Ann. § 83-17-1 (1972) reads as follows:

> Every person who solicits insurance on behalf of any insurance company, or who takes or transmits, other than for himself, an application for insurance or a policy of insurance, or who advertises or otherwise gives notice that he will receive or transmit the same, or who shall receive or deliver a policy of insurance

> of any such company, or who shall examine or inspect any risk, or receive, collect, or transmit any premium of insurance, or make or forward a diagram of any building, or do or perform any other act or thing in the making or consummation of any contract of insurance for or with any such insurance company, other than for himself, or who shall examine into or adjust or aid in adjusting any loss for or on behalf of any such insurance company, whether any of such acts shall be done at the instance or request or by the employment of the insurance company, or of or by any broker or other person, shall be held to be the agent of the company for which the act is done or the risk is taken as to all the duties and liabilities imposed by law, whatever conditions or stipulations may be contained in the policy or contract. Such person knowingly procuring, by fraudulent representations, payment or the obligation for the payment of a premium of insurance shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or be imprisoned for not more than one year.

Decisions of this Court interpreting § 83-17-1 are far too numerous to attempt to enumerate them all. Some examples follow. In *Hartford Fire Insurance Co. v. Clark*, 154 Miss. 418, 122 So. 551 (1929), this Court held:

> Appellant does not seriously contend that the testimony is not sufficient to support the finding of fact that the agent Dicken had knowledge of the condition of the title or quality of ownership of the insured when he accepted and forwarded the application and when he countersigned and delivered the policy and collected the premium. Nor does appellant directly attempt to controvert the proposition of law that "an insurance company, like other principals, is bound by knowledge of, or notice to, its agents within the general scope of his authority, notwithstanding a contrary provision in

the application or policy." 32 C.J. 1069. This proposition of law has become too firmly fixed in our jurisprudence to be now questioned. For instance, on this point it was said in *Rivara v. Ins. Co.*, 62 Miss. at page 729: "In such case the insurance company cannot claim that it has been wronged or deceived, and to permit it to issue a policy and take the benefits of the contract, knowing at the time that it is not bound thereby, and afterwards to avoid liability thereon, upon the ground that something existed or did not exist of which the company or its agent was fully aware at the time the contract was made, would be repugnant to that sense of justice and morality which is and should be inculcated by law." See, also, *Ins. Co. v. Randle*, 81 Miss. 720, 33 So. 500; *Ins. Co. v. Gibson*, 72 Miss. 58, 17 So. 13.

But it is the contention of appellant that the agent Dicken was a mere soliciting agent, that he had no authority to issue a farm policy such as this, and that the facts were such as to put the insured on notice of this limited authority. Putting aside the fact that this policy under its express terms had no validity until countersigned by S. H. Dicken & Son, and that their signature was not the intermediate but the final act of execution which put the policy into existence, and conceding for the purposes of this case that Dicken was a soliciting agent only, we think the weight of modern judicial opinion throughout the country supports the proposition that "knowledge acquired by a soliciting agent in the course of his employment in soliciting insurance, preparing and transmitting applications, delivering policies, etc., is ordinarily imputed to the company," 32 C.J. 1325; 26 C.J. 296-298, and, were the question a new one in this case and in this state, we would so hold, not only upon principles of the common law, but upon what we deem to be the clear provisions of our statute, section 2615, Code 1906 (section 5873 Hemingway's 1927 Code). But the question is not new

in this state; it was expressly decided in *Big Creek Drug Co. v. Ins. Co.*, 115 Miss. 333, 75 So. 768, in which the court said: "It makes no difference whether Dezonia was a soliciting agent or a general agent of his company. The testimony undisputably shows that he was the only agent who solicited the insurance, inspected the risk, accepted the application, receipted for the premium, and delivered the policy. . . . In this case the knowledge of Dezonia was the knowledge of the company; and a policy delivered with full knowledge of a state of facts which under its written stipulations, would render the insurance void should be binding upon the company."

We not only approve the holding in the cited case, but we approve and adopt the terse expression taken from the opinion in *Bergeron v. Ins. Co.*, 111 N.C. at page 47. 15 S.E. 883, wherein the whole matter is cast into one sentence as follows: *"The principle has been more than once announced by this court, that where a soliciting agent is informed, before the policy is issued, of a fact, which, if fraudulently concealed by the applicant, would constitute a ground of forfeiture under one of its conditions, and afterwards receives the premium and delivers the policy, his knowledge is imputed to his principal, and, whether he actually communicates the fact to the principal office of the company or not, the condition is deemed to have been waived."* (Emphasis supplied)

154 Miss. at 427-429, 122 So. at 554.

In *Life Insurance Co. v. Cassity*, 173 Miss. 840, 163 So. 508 (1935), the Court briefly set forth the facts and rules of law as follows:

We are of the opinion that the case at bar is not controlled by said cases, and others of similar import. The proof of both the appellant and the appellee showed

> that the cashier of the Jackson office had authority to transmit applications for benefits under policies issued by the company in this state to the home office. It is true that the cashier did not pass upon the sufficiency of the proof to establish liability, but he was authorized to assist policyholders in preparing applications. It was his duty to transmit them to the home office, and to advise policyholders as to what their rights were under the policies, and what proof was necessary for them to furnish to the company in order to sustain their claims; and, as stated by the company's former agent, frequently claims were adjusted and disabilities paid, although in the opinion of the agent of the company they were not strictly bound thereby. In other words, the cashier of the local office was an agent for the company for receiving applications to be transmitted to the home office. That being true, the cashier of the Jackson office was the agent of the company or its alter ego, under section 5196, Code 1930, and the cases there cited and Aetna Ins. Company v. Lester, 170 Miss. 353, 154 So. 706.

175 Miss. at 851, 163 So. at 511.
See also *World Insurance Co. v. Bethea, supra,* and *Big Creek Drug Co. v. Insurance Co.,* 115 Miss. 333, 75 So. 768 (1917).

Next, National argues that the knowledge of Dillon was not imputable to it because following the tape recorded conversation between Mrs. Miller and Dillon, the Millers had knowledge that Dillon was not being honest with National and therefore the inference that his knowledge was imputable to National was not applicable. At first blush, this argument sounds persuasive; however, upon examination its logic loses its luster. First, although Dillon told Mrs. Miller that he was going to *misrepresent* his knowledge to the insurance company, Mrs. Miller had no way of knowing that he would actually do so. Secondly, and more im-

portantly, the Millers had absolutely no reason to believe that Blount or Brashier would join in this conspiracy of silence by failing to disclose and, at times, misrepresent the extent of their knowledge. Certainly the knowledge of Blount and Brashier was attributable to National. Both men were aware that Dillon had not been honest with the company. Both men, after having discussed repeatedly the fact that Mrs. Miller did inform them of the child's heart murmur, made the conscious decision not to disclose the truth. Blount and Brashier were supervisors and held executive positions with National. They not only had the authority, but the affirmative duty of transmitting the extent of their knowledge to National's claims office. Their failure to do so is completely unexplained by the record except by the inference that they were willfully covering up Blount's negligence in filling out the insurance application.

Of course, bad faith on the part of an insurance company must be in the form of some act or failure to act on the part of an individual or individuals acting for the company. Where these agents failed to correctly record Mrs. Miller's responses on the application and then further failed to bring that error to the attention of the claims department, and in fact, misrepresented the extent of their knowledge, it cannot be said that a jury would not be justified in finding that those agent's actions amounted to willfulness or such gross negligence as to amount to a reckless disregard of the Millers' rights. In that situation, the issue of punitive damages is properly submitted to the jury. *Bankers Life & Casualty Co. v. Crenshaw, supra; Commodore Corp. v. Bailey,* 393 So.2d 467 (Miss. 1981).

In *Napp v. Liberty National Life Ins. Co.,* 248 Miss. 320, 159 So.2d 164 (1963), this Court held that it is well settled that the principal is liable for the frauds and misrepresentations of his agent acting within the scope of the authority or employment of the agent, even though he had no knowl-

edge thereof and received no benefits therefrom. In this case, the knowledge of Blount and Brashier was attributable to National. That knowledge was not only that Mrs. Miller had revealed her son's heart murmur, but also that Agent Dillon was misrepresenting the extent of his knowledge. Instead of coming forward with what they knew to be the truth, Blount and Brashier also chose to conceal the truth.

Finally, we look at the extent of investigation into the claim made by National prior to its rejection. National's claims office and its attorneys never interviewed Blount or Dillon until only two weeks prior to trial, some eleven months after rejecting the claim. Those attorneys never made discovery requests which would have revealed Dillon's tape recorded conversation with Mrs. Miller. In addition, the failure of National to even interview Dillon's supervisor, Blount, until just two weeks prior to trial is tantamount to the inexcusable inadequate investigation we condemned in *Bankers Life & Casualty Co. v. Crenshaw, supra.* When all of these circumstances are viewed together, we conclude that the issue of bad faith and punitive damages was properly submitted to the jury.

DID THE TRIAL COURT ERR IN FAILING TO ALLOW DEFENSE COUNSEL TO WITHDRAW THEIR REPRESENTATION OF LAVERN DILLON?

The day before trial the defense attorneys moved to be relieved as counsel for Dillon citing a conflict of interest. A pretrial hearing was held on this motion. Here, National is arguing that because Dillon misrepresented the extent of his knowledge to the company a conflict of interest arose in defending both Dillon and National. National asserts that the burden of defending Dillon prevented it from defending the bad faith allegation by asserting that its actions had been the result of misrepresentations by Dillon. This argument fails for two reasons. First, as discussed above, the misrepresentations and non-disclosures of National's agents

were not limited to Dillon. Blount and Brashier were equally culpable when it came to stymieing Mrs. Miller's claim. By simply asserting that Dillon was responsible for misrepresentations to the claims office, National was in no better position. Secondly, a directed verdict as to Dillon was entered at the close of the plaintiff's case; therefore, the defense attorneys were relieved of any obligation to put on proof as to Dillon's defense. They were then freed to point the finger of blame at Dillon, regardless of how legally ineffective that might have been. There is no merit to this argument.

DID THE COURT ERR IN FAILING TO GRANT THE DEFENSE MOTION TO DISMISS AGAINST CAROLINE MILLER?

Here National argues that the policy provided on its face that Marvin Miller was the insured. Caroline Miller was listed only as the "insured spouse." National then argues that by the terms of the policy, the death benefits for the child were payable only to Marvin Miller, if living, and otherwise to Caroline Miller. National asserts that it had no obligation to Caroline Miller except at the death of her husband.

We begin by noting that procedurally this argument is barred. Under *Standard Life Insurance Co. of Indiana v. Veal,* 354 So.2d 239 (Miss. 1977), National should have filed an objection to non-joinder as required by Miss. Code Ann. § 11-7-21 (1972). The Court in *Veal* held that had the non-joinder issue been raised *before* trial, the plaintiff would have been permitted to amend the declaration. By waiting until after the Millers had rested their case, National forfeited its objection to Mrs. Miller's participating in the suit.

Furthermore, the rule in this state is that an application for insurance which is attached to a contract is part of the insurance contract. *Interstate Life & Accident Ins. Co. v.*

Flannigan, 284 So.2d 33 (Miss. 1973). Ordinarily where there is an ambiguity between the policy and the application, the terms of the policy will govern, *Flanagan*; however, this Court has also frequently held that any ambiguities in an insurance contract are to be strongly construed against the insurer. *Bellefonte Insurance Co. v. Griffin,* 358 So.2d 387 (Miss. 1978); *Life and Casualty Ins. Co. of Tenn. v. Kelly,* 202 Miss. 319, 32 So.2d 120 (1947).

Finally, it is difficult to see any prejudice to National as the result of the failure to dismiss Caroline Miller. She sought no damages peculiar to her. The damages sought were the policy limits and punitive damages. Neither of those amounts were affected by Mrs. Miller's inclusion as a plaintiff. The policy limits were a predetermined figure and, as we have stated in *Bankers Life & Casualty Co., supra* and *Snowden v. Osborne,* 269 So.2d 858 (Miss. 1972), punitive damages are in the nature of punishment for the wrongdoing of the defendant and to set an example so as to deter others from similar behavior. The failure of National to timely object to Mrs. Miller's inclusion as a plaintiff and the absence of any prejudice leads us to find no merit to this assignment of error.

DID THE CIRCUIT COURT ERR IN ALLOWING THE TAPE RECORDED CONVERSATION BETWEEN MRS. MILLER AND DILLON INTO EVIDENCE?

Although we have previously disapproved of attorneys secretly tape recording conversations with adverse parties, *Netterville v. Miss. State Bar,* 397 So.2d 878 (Miss. 1981), we have also held that the admission of a tape recording and transcript into evidence under like circumstances was fully justified. *Wilkins v. Bancroft,* 248 Miss. 622, 160 So.2d 93 (1964). We take this opportunity to clarify our position. An attorney's actions in secretly tape recording conversations with adverse parties cannot be condoned. In *J. C. Penney Co. Inc. v. Blush,* 356 So.2d 590 (Miss. 1978), this

Court adopted the formal opinion 337, A.B.A. Committee on Ethics and Professional Responsibility, which stated in part: "The committee concludes that no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." Nevertheless, while we cannot condone the attorney's actions here, we do not regard the introduction of the tape as reversible error. Dillon freely admitted the conversation and its contents and the parties had stipulated to the accuracy of the transcription. Because Dillon conceded having made the statements we conclude that there was no showing of prejudice. We therefore conclude that there is no merit to this assignment of error.

THE AMOUNT OF PUNITIVE DAMAGES

Here National argues that the amount of punitive damages awarded was excessive. They relate the $350,000 punitive damage award to the $2,500 award of actual damages. Punitive damages are designed to provide punishment and deterrence. In *Commodore Corp. v. Bailey,* 393 So.2d 467 (Miss. 1981), we stated: "We have held many times that in the event the jury awards punitive damages, the amount is solely within the jury's discretion unless arbitrary and unreasonable. The amount cannot be determined by any fixed rule." See also, *Bankers Life Ins. Co. v. Crenshaw, supra.*

In the instant case, National Life has a net worth of $470,000,000. It had net profits for the year 1981 of $134,000,000. Based on those figures, we are of the opinion that the punitive damages awarded in the amount of $350,000 are not excessive.

We have carefully reviewed the other assignments of error and find them wholly without merit. In our opinion National received a fair trial on all issues and was not subjected to any prejudicially erroneous rulings of the trial

court. We therefore affirm the judgment of the Circuit Court of Forrest County against National Life and Accident Insurance Company in the amount of $352,500 in favor of Caroline Miller and Marvin Ramsey Miller, Sr.

AFFIRMED.

Patterson, C.J., Walker and Roy Noble Lee, P.JJ., and Prather, Robertson, Sullivan and Anderson, JJ., concur. Hawkins and Sullivan, JJ., specially concur.

IN THE SUPREME COURT OF MISSISSIPPI

No. 54-702

Decided November 13, 1985

NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY

v.

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.

Hawkins, Justice, specially concurring:

In all likelihood Dillon's and Blount's sole source of income from National Life was on commission. Furthermore, their largest commission came from the initial premium paid on an insurance policy.

If the policy was issued following the application, they kept the commission. If the policy was not issued, the premium had to be refunded.

When the soliciting agent, rather than the applicant fills in the application, it is naive to assume there is not a strong temptation on his part to ignore an answer the applicant gives which would prevent the company's issuing a policy, which would "knock out" a sale.

The insurance companies surely know this. Yet, they permit their agents to be put in such conflict of interest positions, only to assert later, with a presumably straight face, that precisely what happened in this case should never occur.

Not only this, having approved a system or practice which encourages giving false answers (by their own agents) to questions on their application forms, they use the deceit of their own employees as a weapon to deny a claim.

It would be quite simple to remove from the agent any responsibility or authority to fill in the application form.

The question then follows, why don't insurance companies do so?

The answer, for insurance companies such as this defendant, is not savory.

Justice Lee makes this very point. Did National Life know, or have every reason to know, that Blount and Dillon had been told by Mrs. Miller that her son had a heart problem when the application was taken? When she made the claim for her son's death, she told the company she had told Dillon and Blount the truth. Yet the company waited eleven months after rejecting her claim, and just two weeks before trial before it ever so much as questioned Dillon and Blount, its own employees, about the circumstances surrounding the application.

This iniquitous practice of National Life has a parallel in *Bankers Life and Casualty Co. v. Crenshaw*, Cause No. 54,123 (decided September 11, 1985, and not yet reported). Bankers Life denied a claim on a policy provision it knew was untenable. It played the odds, and in Crenshaw's case it lost. National Life could play the odds with its practice of encouraging agents to submit false applications and then be able to deny a claim because the application was false. In this case National Life has played the odds and lost.

A punitive damages award in this case is quite proper. Again, a court has been called upon to redress grievances which could be avoided by proper state regulation of insurance company practices.

SULLIVAN, J., JOINS THIS OPINION.

APPENDIX B

MINUTES,
SUPREME COURT OF MISSISSIPPI
SEPTEMBER TERM, 1985

Wednesday, November 13, 1985, Court Sitting

#54,702

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY

v.

CAROLYN MILLER, ET AL.

This cause having been submitted at a former Term of this Court on the record herein from the Circuit Court of Forrest County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the Judgment of said Circuit Court rendered in this cause on the 19th day of November, 1982, be and the same is hereby affirmed. Judgment is in favor of Carolyn Miller and Marvin Ramsey Miller, Sr. in the amount of $352,500.00 plus interest at the rate of 8% per annum from November 19, 1982 until paid together with all costs taxed in the Lower Court against National Life & Accident Insurance Company and United States Fidelity & Guaranty Company of Baltimore, Maryland, surety, and this Court adds damages in the amount of 15% as provided for by statute. It it further ordered and adjudged that the appellant do pay all of the costs of this appeal to be taxed.

APPENDIX C

IN THE SUPREME COURT OF MISSISSIPPI

DECISIONS HANDED DOWN DECEMBER 4, 1985

(Continued—Page 2)

• • • • • • • • • • •

THE COURT SITTING EN BANC:

• • • • • • • • • • •

54,702 National Life & Accident Ins. Co., a Tenn. Corp., v. Carolyn Miller & Marvin Ramsey Miller, Sr.; Circuit, Forrest; Petition for Rehearing Denied. Motion to Correct Judgment Overruled.

• • • • • • • • • • •

ONLY CASES MARKED "X"
HAVE WRITTEN OPINIONS.

Respectfully submitted,

Robert E. Womack, Clerk
Yvonne P. Burnham, D. C.

APPENDIX D

IN THE CIRCUIT COURT OF
FORREST COUNTY, MISSISSIPPI

No. 12-81-716

CAROLYN MILLER AND
MARVIN RAMSEY MILLER, SR.

Plaintiffs

versus

NATIONAL LIFE AND ACCIDENT
INSURANCE COMPANY

Defendant

JUDGMENT

ON THIS DAY, this cause came on to be heard on the Declaration of Plaintiffs and Answer filed on behalf of the Defendant, National Life and Accident Insurance Company, and the parties appeared in person and by and through their respective attorneys of record and announced ready, and a jury of George Anthony Jackson and eleven other good and lawful jurors of Forrest County, Mississippi, was tendered to Plaintiff and by Plaintiff accepted, and was tendered to Defendant and by Defendant accepted, and said jury having been accepted by the parties, was duly sworn and empanelled to try the issues, and after having received and considered all the evidence in the case and instructions of the Court and after having heard the arguments of counsel, said jury retired to consider its verdict, and after due and proper deliberation, presently returned into Open Court the following verdict:

> "We, the jury, find for the Plaintiffs in the amount of $2,500.00 actual damages and in the amount of $350,000.00 punitive damages."

IT IS THEREFORE, THE ORDER AND JUDGMENT OF THE COURT that Plaintiffs do have and recover of and from Defendant, National Life and Accident Insurance Company, the sum of Two Thousand Five Hundred Dollars ($2,500.00) as actual damages and the sum of Three Hundred Fifty Thousand Dollars ($350,000.00) as punitive damages, together with all costs incurred in this behalf, for all of which let execution issue.

SO ORDERED AND ADJUDGED on this, the 19th day of November, A. D., 1982.

/s/ JACK (illegible)
Circuit Court Judge

APPENDIX E

IN THE SUPREME COURT OF MISSISSIPPI

Number 54,702

NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant

versus

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.,

Appellees

PETITION FOR REHEARING

COMES Now appellant, National Life and Accident Insurance Company and respectfully petitions this Honorable Court to reconsider its opinion dated November 13, 1985, affirming a jury award of $350,000.00 in punitive damages and $2,500.00 in contractual damages on a policy of life insurance and in support of said petition would respectfully shows unto the Court the following, to-wit:

1. A party making an unsuccessful factual defense should not be subjected to a punitive damage instruction.

2. The jury instructions were improper.

3. The lower court erred in allowing into evidence secretly recorded tape conversation with an adverse party.

4. The lower court permitted improper jury arguments.

5. Imposition of the fifteen percent penalty mandated by Section 11-3-23 violates the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

/s/ S. WAYNE EASTERLING
S. Wayne Easterling, Attorney
for Appellant

Easterling & Varnado
Post Office Box 3270
Hattiesburg, Mississippi 39401
(601) 544-8900

CERTIFICATE

A true copy of the foregoing Petition for Rehearing has been mailed, postage prepaid, to Honorable Michael B. McMahan, Post Office Box 31, Hattiesburg, Mississippi 39401, attorney for appellees; to Honorable Jack B. Weldy, Post Office Box 43, Hattiesburg, Mississippi 39401, former Circuit Judge, Twelfth Judicial District; and to Honorable Richard McKenzie, Post Office Box 1403, Hattiesburg, Mississippi 39401, Circuit Judge, Twelfth Judicial District, on this 26th day of November, A. D., 1985.

/s/ S. WAYNE EASTERLING
S. Wayne Easterling, Attorney
for Appellant

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

Number 54,702

NATIONAL LIFE AND ACCIDENT
INSURANCE COMPANY

Appellant

versus

CAROLYN MILLER AND
MARVIN RAMSEY MILLER, SR.

Appellee

**BRIEF IN SUPPORT OF
PETITION FOR REHEARING**

EASTERLING AND VARNADO
Post Office Box 3270
Hattiesburg, Mississippi 39401
(601) 544-8900

Attorneys for Appellant

INDEX

Page

A. A Party Making Unsuccessful Factual Defense Should not be Subjected to a Punitive Damage Instruction 30a
Gordon v. Nationwide Mut. Ins. Co., 285 N.E.2d 849 (New York 1972) 31a
Lincoln Nat. Life Ins. Co. v. Crews, 341 So.2d 1321 (Miss. 1977) 31a
Progressive Casualty Insurance Company v. Keys, 317 So.2d 397 (Miss. 1975) 31a
State Farm Mut. Auto. Ins. Co. v. Roberts, 379 So.2d 321 (Miss. 1980) 31a
United States Constitution, Article Fourteen 31a
United States Constitution, Eighth Amendment .. 32a

B. The Instructions Were Improper 32a

C. The Court Erred in Allowing into Evidence Secretly Recorded Tape Conversation with an Adverse Party 33a

D. Improper Jury Arguments Were Permitted 34a
Shell Oil Company v. Pou, 204 So.2d 155 (Miss. 1967) 34a

E. Imposition of the Fifteenth Percent Penalty Mandated by Section 11-3-23 Violates the Fourteenth Amendment to the Constitution of the United States 35a
Canal Bank & Trust Co. v. Brewer, 114 So. 127 (Miss. 1927) 35a
Lindsey v. Normet, 406 U.S. 56 (1972) 36a
Louisville & N.R.R. v. Stewart, 241 U.S. 261 (1916) 36a
Mississippi Code of 1972, Section 11-3-23 ..... 36a
O'Day v. George Arakelian Farms, Inc., 536 F.2d 856 (9th Cir. 1976) 37a
Wallace v. Jones, 360 So.2d 932 (Miss. 1978) 35a
United States Constitution, Fourteenth Amendment 35a

Conclusion 37a

Certificate 38a

IN THE SUPREME COURT OF MISSISSIPPI

Number 54,702

NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant

versus

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.,

Appellees

BRIEF IN SUPPORT OF PETITION FOR REHEARING

The appellant herein respectfully requests this Court to reconsider its opinion dated November 13, 1985, affirming a jury award of $350,000.00 in punitive damages and $2,500.00 in contractual damages on a policy of life insurance. The opinion of the Court holds that when an insurance company offers a factual defense to a claim for policy benefits the company exposes itself to a jury issue on the question of punitive damages. Since this is now the law in Mississippi as a result of this opinion, the appellant would respectfully request the Court to reconsider its holding in this case for the following reasons:

A. A Party Making Unsuccessful Factual Defense Should Not Be Subjected To A Punitive Damage Instruction.

The policy application in this case contained a space for the applicant to list whether the child had been hospitalized or under a doctor's care within the preceding . -e years. This space was checked "no", and the blank space provided for information concerning an affirmative answer was left blank. One of the appellees testified that she advised the agents that the child had been under a doctor's care and had been hospitalized within the preceding five

years. The two agents testified that she did not. Had the jury believed the testimony of appellant's agents, then obviously no damages would have been awarded. Thus, a classic factual dispute was in existence for determination by the jury. Both sides agreed that Carolyn Miller had mentioned her child having a heart murmur. However, the agents testified that Carolyn Miller had specifically told them that the child had not required medical treatment or hospitalization within the preceding five years.

This Court has heretofore held that losing a factual dispute is not sufficient grounds to impose punitive damages. Cases so holding include *Lincoln Nat. Life Ins. Co.* v. *Crews,* 341 So. 2d 1321 (Miss. 1977); *Progressive Casualty Insurance Company v. Keys,* 317 So.2d 397 (Miss. 1975); and *State Farm Mut. Auto. Ins. Co. v. Roberts,* 379 So.2d 321 (Miss. 1980). See also *National Savings Life Insurance Co. v. Dutton,* 419 So.2d 1357 (Ala. 1982), and *Gordon v. Nationwide Mut. Ins. Co.,* 285 N.E.2d 849 (New York 1972).

It is respectfully submitted that the decision of this Court imposing punitive damages as a result of an unsuccessful factual defense created in 1981 an obligation in the form of a cause of action not heretofore recognized at state law. As such, this conduct could very well violate Article Fourteen, Section 10, of the Constitution of the United States.

Had the Legislature of the State of Mississippi adopted retroactively a statute imposing such liability upon appellant, it is doubtful that such statute could pass muster under the Contract Clause of the United States Constitution. Here, appellant is being subjected to damages equal to 140 times the actual damages as a result of awarding punitive damages for an unsuccessful factual dispute.

The opinion of this Court was very straight forward in its statement of the purposes purportedly achieved by im-

posing $350,000.00 in punitive damages for appellant's failure to pay the sum of $2,500.00: "Punitive damages are in the nature of punishment for the wrongdoing of defendant and to set an example so as to deter others from similar behavior." Were this a criminal prosecution, the monetary penalty that could be assessed would be substantially less than $350,000.00. It is respectfully submitted that the punitive damage award herein is so grossly disproportional to the actual damages sustained as to violate due process rights and the Excessive Fine Clause of the Eighth Amendment to the Constitution of the United States.

B. The Instructions Were Improper.

As stated above, the classic issue for determination by the jury was whether the agents for appellant were advised of the child's true condition. Had the jury believed the testimony of appellant's agents, then no contractual or punitive damages should be awarded. Such disputed matters of fact have historically been resolved by a jury instructed that the "preponderance of the evidence" standard applies. However, this jury was instructed that the defendant ". . . have [sic] the burden of proving by *positive, clear, and convincing testimony* that the plaintiffs willfully made fraudulent responses of material facts in response to questions contained in the application for insurance; and if the defendant failed [sic] to prove by *positive, clear, and convincing testimony* that the plaintiffs did *willfully* supply fraudulent responses of material facts to the questions contained in the application for insurance, then you shall return a verdict for the plaintiffs . . . ." (emphasis added)

Appellant respectfully submits that it was not required to prove its factual defense by "positive, clear, and convincing testimony" and that a new trial should be granted so that this error could be corrected.

Appellant further respectfully submits that this Court has consistently held that punitive damages are not favored by the law and are to be given only in cases in which the actions of the defendant are such that the defendant should be punished in order to deter others. In other words, a jury is not required to award punitive damages. Such an instruction was requested by appellant and was refused by the lower court (A. 21-22). The importance of this instruction being refused is that Instruction No. P-3 (A. 19), granted to appellees over objection, authorized the jury to bring back a punitive damage award without adequate guidance. Rather than this being a situation of "sauce for the goose being sauce for the gander", the instructions granted to the plaintiffs directed the jury to bring back punitive damages, whereas the defendant's attempt to instruct the jury that such damages were not mandatory was prohibited by the court.

Thus, appellant is respectfully requesting this Court to consider the dilemma confronting appellant during this trial. The appellant was required to prove its factual defense by *positive, clear, and convincing evidence.* It was forbidden to tell the jury that punitive damages were not to be awarded as a matter of course, but rather the instruction granted to the plaintiffs conveyed this idea. In essence, the appellant was "instructed" out of court, and the jury had no alternative but to award punitive damages.

C. The Court Erred In Allowing Into Evidence Secretly Recorded Tape Conversation With An Adverse Party.

Appellant respectfully submits that this Court should reconsider the part of its ruling allowing into evidence secretly recorded tape conversation between parties when the party unaware of the conversation concedes the accuracy of the improper recording. In the very nature of things, it is extremely difficult to dispute the accuracy of an electronic recording. When a recorded statement is al-

lowed into evidence, the unaware party is generally unable to dispute its accuracy. It is respectfully submitted that admittedly inappropriate conduct should not be condoned.

D. Improper Jury Arguments Were Permitted.

In *Shell Oil Company v. Pou,* 204 So.2d 155 (Miss. 1967), this Court stated the following:

> "The only legitimate purpose of the argument of counsel in a jury case is to assist the jurors in evaluating the evidence and in understanding the law and in applying it to the facts. Appeals to passion and prejudice are always improper and should never be allowed." *Shell Oil Company v. Pou,* supra, at 157.

The following remarks were made in closing argument by plaintiffs' counsel, over specific objections of defendant. Not only did the trial court overrule motion for mistrial, but the court also overruled objection to the remarks:

> "I represent the lady sitting here at the table with me. I don't represent the insurance company, and I'm here because I'm sick of insurance companies ripping people off, and you ought to be sick of it, too."
>
> • • • • •
>
> "If you don't bring back a large sum of punitive damages, there will be a bunch of agents for this company sitting around a board room in Nashville laughing, saying, 'Thank God for Mississippi.' " (A. 22)

The above two remarks were in no way intended to assist the jury in evaluating the evidence, understanding the law, and applying it to the facts. Rather, they were a blatant attempt to inflame and prejudice the jury against the corporate defendant and such remarks should not be condoned.

E. Imposition Of The Fifteen Percent Penalty Mandated By Section 11-3-23 Violates The Fourteenth Amendment To The Constitution Of The United States.

This Court affirmed unconditionally judgment against appellant in the amount of $352,500.00, and the mandate added damages in the amount of 15 percent as provided by Section 11-3-23 of the Mississippi Code of 1972. Thus, the mandate imposes a penalty upon a penalty. Appellant respectfully contends that Section 11-3-23 as applied violates both the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States. In making this argument, appellant is fully cognizant of a contrary holding of this Court in *Wallace v. Jones,* 360 So.2d 932 (Miss. 1978). Likewise, appellant is aware of Rule 19 of the Supreme Court Rules, and appellant is filing simultaneously herewith out of an abundance of caution a Rule 19 motion requesting that the mandate be corrected.

Despite the earlier holding of this Court, appellant would respectfully show that there must be a rational basis between the purpose sought to be achieved by a statute and the result. Section 11-3-23 does not specify its purpose, but earlier holdings of this Court indicate that it is designed to compensate the appellee for the cost of appeal. See *Canal Bank & Trust Co. v. Brewer,* 114 So. 127 (Miss. 1927). If so, the statute does a very poor job of achieving its purpose. In cases involving small amounts of money, the amount awarded will be totally inadequate. In sizeable verdicts, application of the statute results in a "wind fall" to the prevailing party.

It might also be argued that Section 11-3-23 was designed to prevent frivolous appeals. However, the problem with the statute is that it deters both frivolous and meritorious appeals, and a preferable remedy would be to impose penalties only in those instances in which an appeal is determined to be wholly without basis or substance. In short,

if this is a purpose, then the statute is unreasonably severe and manifestly overinclusive. Appellant believes that only one other state enforces a nondiscretionary penalty against an unsuccessful appellant, and the Alabama statute so providing is being challenged in the Supreme Court of the United States in suit styled Aetna Life Insurance Co. v. Lavoie, et al, with certiorari having been granted.

The Supreme Court of the United States has upheld a Kentucky statute imposing a penalty of an unsuccessful appellant when judgments stayed on appeal as a result of a supersedeas bond were affirmed. *Louisville & N.R.R. v. Stewart,* 241 U.S. 261 (1916). However the Court based its decision on the granting of a supersedeas appeal, and this decision is not dispositive of this case since Section 11-3-23 applies to any appellant regardless of whether the judgment has been stayed. A case more nearly in point is *Lindsey v. Normet,* 405 U.S. 56 (1972). In *Lindsey,* the United States Supreme Court struck down the Oregon Forceful Entry and Wrongful Detainer Statute which presented an obstacle to appeal by discriminating against those who could not post a double bond. The United States Supreme Court held the Oregon statute to be invalid because a double bond bore no reasonable relation to the damages sustained by the successful party. The Court further recognized that the statute discouraged meritorious appeals as well as frivolous appeals and discriminated against appellants who could not post bond.

It is true that Section 11-3-23 is different from *Lindsey* in that it does not completely bar an appeal. However, it does present a substantial barrier to appeal because the possibility of having to pay an additional 15 percent of the judgment constitutes a substantial consideration in determining whether to pursue appellate remedies.

The Ninth Circuit Court of Appeals applied the *Lindsey* reasoning to the double bond requirement of the Perishable

Agricultural Commodities Act in *O'Day v. George Arakelian Farms, Inc.*, 536 F.2d 856 (9th Cir. 1976). This decision recognized that a state can impose penalties to deter frivolous appeals and to require security for protection of the original judgment. However, both *Lindsey* and *O'Day* recognized that the penalty must be reasonably tailored to the state purpose sought to be accomplished and must be nondiscriminatorily applied. Thus, it is respectfully submitted that the statute does not meet the legitimate state purposes sought to be served by it.

In addition thereto, the mandatory application of Section 11-3-23 works to deprive an unsuccessful appellant of its property without meeting due process requirements. If the purpose of the statute is to protect appellees from frivolous appeals, then the appellant should be permitted to demonstrate that the appeal was substantial and not frivolous. Without such opportunity the statute violates the Fourteenth Amendment to the United States Constitution.

Conclusion

This case was submitted to the jury for resolution of sharply disputed factual contentions. Simply put, the two agents said that Carolyn Miller was asked, but did not tell them, that her son had been hospitalized and had received medical treatment within the preceding five years. She testified to the contrary. Had the jury accepted the testimony of appellant's agents, then appellant would have won both on punitive and contractual damages. It is respectfully submitted that the matters discussed above prevented appellant from receiving a fair trial and the case should be remanded for a new trial on all issues. If mistaken in the above, appellant respectfully requests that the judgment be corrected to delete the 15 percent penalty provided by statute.

Respectfully submitted,

/s/ S. Wayne Easterling
S. Wayne Easterling, Attorney
for Appellant

Easterling & Varnado
Post Office Box 3270
Hattiesburg, Mississippi 39401
(601) 544-8900

CERTIFICATE

A true copy of the foregoing Brief in Support of Petition for Rehearing has been mailed, postage prepaid, to Honorable Michael B. McMahan, Post Office Box 31, Hattiesburg, Mississippi 39401, attorney for appellees; to Honorable Jack B. Weldy, Post Office Box 43, Hattiesburg, Mississippi 39401, former Circuit Judge, Twelfth Judicial District; and to Honorable Richard McKenzie, Post Office Box 1403, Hattiesburg, Mississippi 39401, Circuit Judge, Twelfth Judicial District, on this 26th day of November, A. D., 1985.

/s/ S. Wayne Easterling
S. Wayne Easterling, Attorney
for Appellant

APPENDIX F

IN THE SUPREME COURT OF MISSISSIPPI

Number 54,702

NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant

versus

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.,

Appellees

MOTION TO CORRECT MANDATE

COMES Now the appellant and respectfully moves the Court to disallow the fifteen percent (15%) damages on appeal assessed as part of the affirmance of the judgment in the above, and in support of said motion would respectfully show unto the Court the following, to-wit:

1. That applying Section 11-3-23, which imposes a 15 percent penalty upon an unsuccessful appellant, violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

2. That applying Section 11-3-23, which imposes a 15 percent penalty upon an unsuccessful appellant, violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

3. Said statute does not bear a rational basis to the state interest sought to be protected by it and provides a constitutionally impermissible barrier to meritorious appeals.

Respectfully submitted,

/s/ S. WAYNE EASTERLING
S. Wayne Easterling, Attorney
for Appellant

Easterling & Varnado
Post Office Box 3270
Hattiesburg, Mississippi 39401
(601) 544-8900

CERTIFICATE

I, S. Wayne Easterling, certify that I am of counsel for the appellant, that I have personally read a copy of the judgment in question, and that the relief sought by the motion is not already contained in the judgment. I further certify that the matters raised in this motion are out of an abundance of caution being raised in petition for rehearing being filed simultaneously herewith.

This the 26th day of November, A. D., 1985.

/s/ S. WAYNE EASTERLING
S. Wayne Easterling

CERTIFICATE

A true copy of the foregoing Motion to Correct Mandate has been mailed, postage prepaid, to Honorable Michael B. McMahan, Post Office Box 31, Hattiesburg, Mississippi 39401, attorney for appellees, on this 26th day of November, A. D., 1985.

/s/ S. WAYNE EASTERLING
S. Wayne Easterling, Attorney
for Appellant

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

Number 54,702

NATIONAL LIFE AND ACCIDENT
INSURANCE COMPANY

Appellant

versus

CAROLYN MILLER AND
MARVIN RAMSEY MILLER, SR.

Appellees

**BRIEF IN SUPPORT OF
MOTION TO CORRECT MANDATE**

EASTERLING AND VARNADO
Post Office Box 3270
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(601) 544-8900

Attorneys for Appellant

TABLE OF AUTHORITIES

Page

Canal Bank & Trust Co. v. Brewer, 114 So. 127 (Miss. 1927) 44a

Lindsey v. Normet, 405 U.S. 56 (1972) 45a

Louisville & N.R.R. v. Stewart, 241 U.S. 261 (1916) .. 44a

Mississippi Code of 1972, Section 11-3-23 ..... 43a, 44a

O'Day v. George Arakelian Farms, Inc., 536 F.2d 856 (9th Cir. 1976) 45a

Wallace v. Jones, 360 So.2d 932 (Miss. 1978) 44a

United States Constitution, Fourteenth Amendment . 43a-44a, 46a

IN THE SUPREME COURT OF MISSISSIPPI

Number 54,702

NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant

versus

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.,

Appellees

BRIEF IN SUPPORT OF MOTION TO CORRECT MANDATE

On November 13, 1985, this Court affirmed unconditionally jury verdict against appellant in the amount of $352,500.00. Of this amount $350,000.00 was identified as punitive damages arising as a result of "bad faith" claim against appellant, National Life & Accident Insurance Company. The mandate added damages in the amount of 15 percent as provided by Section 11-3-23 of the Mississippi Code of 1972. Appellant has filed simultaneously herewith petition for rehearing which addresses the particular point raised in this motion. The reason that appellant is filing this motion is because that part of Mississippi Supreme Court Rule 19 which states that when the allowance of costs has been incorporated in the opinion, the rule applicable to filing petitions for rehearing applies. In other words, the opinion recognizes that the judgment is affirmed unconditionally. The statute, therefore, requires automatic imposition of the penalty and thus could be construed as being covered by this provision. Obviously, if this Court favorably considers the petition for rehearing, this petition will become moot.

Appellant respectfully contends that Section 11-3-23, which in this case imposes a penalty upon a penalty, as applied violates both the Equal Protection and Due Process

Clauses of the Fourteenth Amendment to the Constitution of the United States. In making this argument, appellant is fully cognizant of a contrary holding of this Court in *Wallace v. Jones,* 360 So.2d 932 (Miss. 1978).

Despite the earlier holding of this Court, appellant would respectfully show that there must be a rational basis between the purpose sought to be achieved by a statute and the result. Section 11-3-23 does not specify its purpose, but earlier holdings of this Court indicate that it is designed to compensate the appellee for the cost of appeal. See *Canal Bank & Trust Co. v. Brewer,* 114 So. 127 (Miss. 1927). If so, the statute does a very poor job of achieving its purpose. In cases involving small amounts of money, the amount awarded will be totally inadequate. In sizeable verdicts, application of the statute results in a "wind fall" to the prevailing party.

It might also be argued that Section 11-3-23 was designed to prevent frivolous appeals. However, the problem with the statute is that it deters both frivolous and meritorious appeals, and a preferable remedy would be to impose penalties only in those instances in which an appeal is determined to be wholly without basis or substance. In short, if this is a purpose, then the statute is unreasonably severe and manifestly overinclusive. Appellant believes that only one other state enforces a nondiscretionary penalty against an unsuccessful appellant, and the Alabama statute so providing is being challenged in the Supreme Court of the United States in suit styled Aetna Life Insurance Co. v. Lavoie, et al, with certiorari having been granted.

The Supreme Court of the United States has upheld a Kentucky statute imposing a penalty of an unsuccessful appellant when judgments stayed on appeal as a result of a supersedeas bond were affirmed. *Louisville & N.R.R. v. Stewart,* 241 U.S. 261 (1916). However the Court based its decision on the granting of a supersedeas appeal, and this decision is not dispositive of this case since Section 11-3-23

applies to any appellant regardless of whether the judgment has been stayed. A case more nearly in point is *Lindsey v. Normet,* 405 U.S. 56 (1972). In *Lindsey,* the United States Supreme Court struck down the Oregon Forceful Entry and Wrongful Detainer Statute which presented an obstacle to appeal by discriminating against those who could not post a double bond. The United States Supreme Court held the Oregon statute to be invalid because a double bond bore no reasonable relation to the damages sustained by the successful party. The Court further recognized that the statute discouraged meritorious appeals as well as frivolous appeals and discriminated against appellants who could not post bond.

It is true that Section 11-3-23 is different from *Lindsey* in that it does not completely bar an appeal. However, it does present a substantial barrier to appeal because the possibility of having to pay an additional 15 percent of the judgment constitutes a substantial consideration in determining whether to pursue appellate remedies.

The Ninth Circuit Court of Appeals applied the *Lindsey* reasoning to the double bond requirement of the Perishable Agricultural Commodities Act in *O'Day v. George Arakelian Farms, Inc.,* 536 F.2d 856 (9th Cir. 1976). This decision recognized that a state can impose penalties to deter frivolous appeals and to require security for protection of the original judgment. However, both *Lindsey* and *O'Day* recognized that the penalty must be reasonably tailored to the state purpose sought to be accomplished and must be nondiscriminatorily applied. Thus, it is respectfully submitted that the statute does not meet the legitimate state purposes sought to be served by it.

In addition thereto, the mandatory application of Section 11-3-23 works to deprive an unsuccessful appellant of its property without meeting due process requirements. If the purpose of the statute is to protect appellees from frivolous appeals, then the appellant should be permitted to demon-

strate that the appeal was substantial and not frivolous. Without such opportunity the statute violates the Fourteenth Amendment to the United States Constitution.

CONCLUSION

It is, therefore, respectfully submitted that the judgment and mandate should be corrected to delete the 15 percent penalty provided by statute in the event that the petition for rehearing is denied.

Respectfully submitted,

/s/ S. Wayne Easterling
S. Wayne Easterling, Attorney
for Appellant

Easterling & Varnado
Post Office Box 3270
Hattiesburg, Mississippi 39401
(601) 544-8900

CERTIFICATE

I, S. Wayne Easterling, certify that I am of counsel for the appellant, that I have personally read a copy of the judgment in question, and that the relief sought by the motion is not already contained in the judgment. I further certify that the matters raised in this motion are out of an abundance of caution being raised in petition for rehearing being filed simultaneously herewith.

This the 26th day of November, A. D., 1985.

/s/ S. Wayne Easterling
S. Wayne Easterling

CERTIFICATE

A true copy of the foregoing Brief in Support of Motion to Correct Mandate has been mailed, postage prepaid, to Honorable Michael B. McMahan, Post Office Box 31, Hattiesburg, Mississippi 39401, attorney for appellees, on this 16th day of November, A. D., 1985.

/s/ S. Wayne Easterling
S. Wayne Easterling, Attorney
for Appellant

APPENDIX G

IN THE SUPREME COURT OF MISSISSIPPI

Number 54,702

NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant

versus

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.,

Appellees

[Received Jan 22 1986 /s/ SUE GORDON
Supreme Court Clerk]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that National Life and Accident Insurance Company, the appellant abovenamed, hereby appeals to the Supreme Court of the United States from:

(a) The final judgment of the Supreme Court of the State of Mississippi of November 13, 1985, affirming the judgment of the Circuit Court of Forrest County against appellant entered in this action on November 19, 1982;

(b) The final order, issued by the Supreme Court of Mississippi, overruling appellant's Petition for Rehearing and Motion to Correct Judgment, entered on December 4, 1985.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

NATIONAL LIFE AND ACCIDENT
INSURANCE COMPANY

By: /s/ CAREY R. VARNADO
Carey R. Varnado,
Attorney for Appellant

Easterling & Varnado
Post Office Box 3270
Hattiesburg, Mississippi 39401
(601) 544-8900

—

CERTIFICATE

A true copy of the foregoing Notice of Appeal to the Supreme Court of the United States has been mailed, postage prepaid, to the Honorable Michael B. McMahan, Post Office Box 31, Hattiesburg, Mississippi 39401, attorney for appellees.

This the 21st day of January, A.D., 1986.

/s/ CAREY R. VARNADO
Carey R. Varnado,
Attorney for Appellant

APPENDIX H

IN THE SUPREME COURT OF MISSISSIPPI

No. 50,273

C. B. WALLACE, Appellant

v.

LA ROYCE JONES, Appellee

ASSIGNMENT OF ERRORS

ORAL ARGUMENT REQUESTED

DARDEN, SUMNERS, CARTER & TROUT, P. A.
P. O. Box 6
NEW ALBANY, MISSISSIPPI 38652
ATTORNEYS FOR APPELLANT

ASSIGNMENT OF ERRORS

Comes now C. B. Wallace, appellant, and assigns as error the following action of the Chancery Court of Alcorn County, Mississippi:

1. Refusing appellant's request to call Orbie Jones as an adverse witness.

2. Refusing the proferred testimony of Hobert Bingham.

3. Upholding the validity of the option.

Respectfully submitted,

/s/ Lester F. Sumners
Lester F. Sumners
Darden, Sumners, Carter & Trout, P. A.
P. O. Box 6
New Albany, MS 38652

Attorneys for Appellant

CERTIFICATE

I certify I have this day personally served a true copy of the above by mailing same to the office of Hon. Robert Krohn, Box 549, Corinth, Mississippi, attorney for appellee.

This June 24, 1977.

/s/ Lester F. Sumners
Lester F. Sumners

IN THE SUPREME COURT OF MISSISSIPPI

No. 50,273

C. B. WALLACE, APPELLANT,
Respondent

vs.

LAROYCE JONES, APPELLEE,
Movant

BRIEF IN SUPPORT OF MOTION FOR STATUTORY PENALTY

PRICE & KROHN
P. O. Box 549
Corinth, Mississippi 38834
Attorneys for LaRoyce Jones

ARGUMENT AND AUTHORITIES

In support of Appellee's Motion for damages in the amount of five-percent (5%) pursuant to the statutory penalty expressed in Mississippi Code Annotated Section 11-3-23 (1972), Movant cites *McGee vs. Clark, 343 So.2nd 486 (Miss. 1977), 346 So.2nd 914, Sup. Ct. No. 49,217.* There, as in the instant case, Appellee filed his cause of action seeking specific performance for the conveyance of land pursuant to an option contract. There, as here, the Chancery Court decreed the specific performance of the option contract; and there, as here, the Supreme Court affirmed the Chancellor's decree.

In the *McGee* case, the Appellee moved for an award of the statutory penalties and in the opinion cited *(346 So. 2nd 914)* this Court awarded the statutory penalties to the successful party. These cases are literally on all fours and this Motion should be sustained.

RESPECTFULLY SUBMITTED,

PRICE & KROHN
BY: /s/ ROBERT G. KROHN
Robert G. Krohn

CERTIFICATE OF SERVICE

I, Robert G. Krohn, one of the attorneys of record for the Movant in the above styled and numbered cause, hereby certify that I have this day mailed, postage prepaid, a true, correct and complete copy of the foregoing Brief to Mr. Lester F. Sumners, Darden, Sumners, Carter & Trout, Post Office Box 6, New Albany, Mississippi, 38652, Attorney of record for C. B. Wallace.

WITNESS my signature, this the 30th day of May, 1978.

/s/ ROBERT G. KROHN
Robert G. Krohn

IN THE SUPREME COURT OF MISSISSIPPI

No. 50,273

C. B. WALLACE, APPELLANT,
Respondent

vs.

LAROYCE JONES, APPELLEE,
Movant

OPPOSITION TO MOTION FOR 5% DAMAGES

DARDEN, SUMNERS, CARTER & TROUT, P.A.
Attorneys at Law
P. O. Box 6
New Albany, MS 38652

Attorneys for C. B. Wallace

IN THE SUPREME COURT OF MISSISSIPPI

No. 50,273

C. B. WALLACE, APPELLANT,

Respondent

vs.

LAROYCE JONES, APPELLEE,

Movant

OPPOSITION TO MOTION FOR 5% DAMAGES

Comes now Appellant Jerry L. Moore, Conservator for C. B. Wallace, and opposes Appellee's motion for five percent (5%) damages under § 11-3-23, Miss. Code 1972, for the following reasons:

1. The statute violates the equal protection requirements of the U.S. Constitution and is void and unenforceable.

2. Because of the "forgiveness: portion of the option, Appellee may get the land without having to pay more than a portion of the Twenty-two Thousand Five Hundred Dollars ($22,500) purchase price. The damage-penalty, if applicable, should not be calculated on the sums that may never be paid.

Respectfully submitted,

/s/ LESTER F. SUMNERS
Lester F. Sumners
Darden, Sumners, Carter & Trout, P.A.
Attorney for Appellant

- Certificate -

I, Lester F. Sumners, one of the attorneys of record for the Respondent in the above styled and numbered cause, hereby certify that I have this day mailed, postage prepaid, a true, correct and complete copy of the foregoing Opposition and Brief to Mr. Robert G. Krohn, P. O. Box 549, Corinth, MS 38834, Attorney of record for LaRoyce Jones.

Witness my signature, this the 2nd day of June, 1978.

/s/ LESTER F. SUMNERS
Lester F. Sumners

IN THE SUPREME COURT OF MISSISSIPPI

No. 50,273

C. B. WALLACE, APPELLANT,

Respondent

vs.

LAROYCE JONES, APPELLEE,

Movant

BRIEF IN SUPPORT OF OPPOSITION TO FIVE (5%) DAMAGES

1. Section 11-3-23, Miss. Code 1972, Is Unconstitutional.

Section 11-3-23, Mississippi Code, 1972, on its face and as applied by decisions, denies to litigants equal protection of the law. The statute, using the term "damages", is designed to discourage appeals and penalize the unsuccessful appellant if he is the man with the land. It is highly penal. *Bancroft v. Martin*, 144 Miss. 384, 109 So. 859, 111 So. 434, 435 (1927). It is totally unrelated to any true damages. If it were meant to be compensatory damages would be awarded to every prevailing party *or at least* to every prevailing appellee.

The statute discriminates in favor of the one who is "trying to get" and against the "one who has". If in a damage suit plaintiff appeals there is no penalty on affirmance. If defendant appeals unsuccessfully he must pay five percent "damages". The expense and nuisance of the unsuccessful appeal is equal in both cases (and the burden on the Court is the same), yet the penalty arbitrarily favors the party seeking the property and discriminates against the one defending it.

The precise discrimination exists here. Jones (defendant, cross-complainant, appellee) sought the obtain the land of Wallace (complainant, cross-defendant, appellant) under an option. The principal issue was consideration.

Jones won specific performance for the sole consideration of one dollar ($1) and now demands 5% damages, his last pound of flesh, even though he has been in full possession and enjoyment of all rights granted him since entry of decree. Jones relies upon *McGee v. Clark,* 343 So.2d 486, 346 So.2d 914 (Miss. 1977).

The *McGee* case cites *Bancroft v. Martin,* 144 Miss. 384, 109 So. 859 (1926), which case points out the unequal treatment of the parties. Bancroft sued for specific performance of an option. Before he exercised the option Bancroft had actual knowledge that the land had been sold to others, an act equivalent to revocation of offer. The sole question was whether there was consideration moving from Bancroft to the owners to make a binding option. The trial court dismissed Bancroft's bill for specific performance. Bancroft appealed and the court affirmed but on appellee's motion for 5% damages (111 So. 434) the court held that since the trial court did not establish a claim or lien there would be no penalty.

Jones relies upon *McGee* because he won. If he had lost he would be entitled to hide behind *Bancroft.* Wallace, the man with the land, gets it in the neck either way. That is not equal justice no matter how long it has gone unquestioned.

It is conceivable (but inequitable) that the Legislature could constitutionally discriminate against a class of litigants, i.e., unsuccessful appellants, on the theory that the "discriminatory classification" is reasonably related to the valid state purpose of discouraging appeals. *Morey v. Doud,* 354 U. S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957).

But the Legislature has said to Wallace that, because he owns the land, he cannot get damages, even if he is a successful appellee. Jones is favored because he has no real estate at stake.

The discriminatory classification against unsuccessful appellants who are stake holders does not meet the test of "reasonableness" or even handed application to a valid state purpose.

Our statute creates an arbitrary class of litigants subject to punishment: not *all* unsuccessful appellants, not even *all* unsuccessful appellants in cases involving money or property, but *only* those who happen to be in possession when the litigation starts. Unless this court can say there is a reasonable justification for penalizing "those who have" this statute is void. *Smith v. Cahoon,* 283 U.S. 553, 51 S.Ct. 582, 75 L.Ed. 1264.

> "[F]reedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment."
>
> • • •
>
> "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kramer,* 433 U.S. 1, 68 S.Ct. 836, 92 L.Ed. ——, 3 ALR 2d.441, 463, 464 (1948).

Subsection 2 of § 11-3-23, Miss. Code, 1972, states that only the stakeholder is liable for damages:

"If the . . . decree be for the possession of real . . . property, the damages shall be assessed . . . ." The *McGee* and *Bancroft* decisions nail it down: if you come to court with empty pockets you are entitled to 5% damages even if you are not actually damaged—if you are the man with the land you cannot get 5% damages no matter how much

harm you suffer. The statute violates the Fourteenth Amendment and is void and unenforceable.

2. Damages Cannot Be Assessed Upon Contingent Sums.

Jones seeks the 5% penalty on the entire purchase price of Twenty-two Thousand Five Hundred Dollars ($22,500) without regard to the contingency of Wallace's death which would "forgive" the unpaid balance of four annual payments of Three Thousand Dollars ($3,000). If Wallace dies before December 30, 1978, Jones will have "bought" the land for Ten Thousand Five Hundred Dollars ($10,500).

In *M. T. Reed Const. Co. v. Martin,* 215 Miss. 472, 63 So.2d 528 (1953), the Court affirmed a workmen's compensation award of 175 weeks—but held that 5% damages would be limited to the payments accrued. No damages were allowed on payments that might be terminated by death. Another analogy would be alimony which is contingent upon death or remarriage.

The value of the land, for assessment of the penalty, should be that contracted by the parties—what one is obligated to pay and what the other is assured of receiving.

This court rejected our argument that the opinion contract was a gift and that the "forgiveness clause" could not be contracted for. Since there is no written opinion it must be assumed that the Court found the option to be an arm's length contract that established value. The value of the land, as far as this record is concerned, must be limited to what Jones contracted to pay. Jones contracted to pay $1. He contracted for a contingent price of $22,500. He has so far paid $10,500. Since there is no way to calculate Wallace's life expectancy the discriminatory penalty should be limited to the contract price (value) that has been fixed. Simple justice will not permit the application of the discriminatory penalty to values Jones may never establish.

Respectfully, submitted,

/s/ LESTER F. SUMNERS
Lester F. Sumners
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Attorneys at Law
P. O. Box 6
New Albany, MS 38652

APPENDIX I

IN THE SUPREME COURT OF MISSISSIPPI

No. 54,702

NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY

versus

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.

ANSWER OF APPELLEES TO MOTION TO CORRECT MANDATE

COME Now the Appellees and in answer to the Motion to Correct Mandate heretofore filed on behalf of Appellant, would say as follows, to-wit:

1.

That the mandate of the Court assessing 15% damages against Appellant is constitutional.

2.

That applying Section 11-3-23 does not violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

3.

That applying Section 11-3-23 does not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

4.

That Section 11-3-23 does bear a rational basis to the state interest sought to be protected by it, and does not provide a constitutionally impermissible barrier to meritorious appeals.

Respectfully submitted,

/s/ MICHAEL. B. MCMAHAN
Michael B. McMahan
Of Counsel for Appellees

CERTIFICATE

I, Michael B. McMahan, of counsel for Appellees in the above styled and numbered cause, do hereby certify that a true and correct copy of the above and foregoing Answer of Appellees to Motion to Correct Mandate has been mailed, postage prepaid, to Hon. Carey R. Varnado and to Hon. S. Wayne Easterling, of counsel for Appellant, P. O. Box 3270, Hattiesburg, MS 39401.

This the 2nd day of December, 1985.

/s/ MICHAEL B. MCMAHAN
Michael B. McMahan
Of Counsel for Appellees

MICHAEL B. MCMAHAN
MCMAHAN AND MCMAHAN
ATTORNEYS AT LAW
POST OFFICE BOX 31
HATTIESBURG, MS 39401
(601) 544-8680

Of Counsel for Appellees

IN THE SUPREME COURT OF MISSISSIPPI

No. 54,702

NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY

versus

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.

APPELLEES' BRIEF IN RESPONSE TO MOTION OF APPELLANT TO CORRECT MANDATE

After having denied liability for payment of $2,500.00 to Appellees as insurance proceeds owed them since their young child's death in July, 1981, Appellant is now delaying payment once more by contending that Appellant's rights have been violated by a mandate of this Court.

Appellant is heard to complain that the imposition of a 15% penalty on the amount of the judgment appealed from the Circuit Court violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States.

Miss. Code Ann. § 11-3-23 (Supp. 1980), which mandates the 15% penalty upon affirmance of a judgment, has withstood the test of time since the enactment of its predecessor in 1848.

The constitutionality of Section 11-3-23 was before the Court in 1978 in *Wallace v. Jones,* 360 So. 2d 932 (Miss. 1978). In its decision upholding the statutory penalty, the Court stated that the statute did not discriminate against a particular class of litigants, since the penalty is assessed against all unsuccessful appellants where the judgment permits recovery, and therefore, the statute did not violate the Due Process requirements of the Fourteenth Amendment.

Appellant argues that there is no rational basis between the purpose sought to be achieved by Section 11-3-23 and the result of that statute. It contends that if one of the purposes is to compensate appellees for the cost of appeal, the statute does an inadequate job of accomplishing that purpose. Appellees would agree with Appellant on that issue. Collecting a 15% penalty on an amount awarded them more than three years ago by a jury would not begin to cover Appellees' costs in terms of emotional distress and anxiety over whether they will finally be vindicated in the eyes of the community before whom they were accused of attempting to profit from their young son's death. Furthermore, although interest at the rate of 8% per annum has been awarded on the Judgment by this Court, that rate is certainly not the prevailing interest rate and has not been in the three years since the judgment was entered. See *Walters v. Inexco,* 440 So. 2d 268 (Miss. 1983).

Appellant further argues that Section 11-3-23 does a poor job of preventing frivolous appeals and may also deter meritorious appeals. Apparently, the statute did not deter this company from appealing a verdict in favor of two uneducated parents who entered into a policy of insurance with the company and paid premiums on that policy monthly.

The Court in *Walters,* considering the purposes of Section 11-3-23, stated:

> As unworkable as these quasi-subjective tests are, an unfettered automatic right of appeal brings its own evils. Unsuccessful defendants will take meritless appeals because they are made, to subject their adversaries to more costs and expense, to squeeze a favorable settlement out of an impecunious plaintiff, and for less laudable reasons.
>
> It protects this Court from being required to spend its time and energy and resources on appeals thoughtless-

> ly taken. Similarly, it tells the litigants that the trial itself is a momentous event, the centerpiece of the litigation, not just a first step weighing station en route to endless rehearings and reconsiderations." 440 So. 2d at Page 275.

Admittedly, Section 11-3-23 is a major consideration for a litigant in deciding whether to appeal an adverse judgment, but it should be. That is one of the purposes of the statute, and it should serve to encourage settlements and thus save the parties money and save the time of the appellate courts.

A statute similar in nature to Section 11-3-23 was approved by the United States Supreme Court in *Louisville & Nashville Railroad Company v. Stewart*, 241 U.S. 261, 263 (1916). In affirming the constitutionality of the state statute authorizing 10% damages on the amount of a judgment affirmed on appeal, the U. S. Supreme Court stated:

> There was no obligation upon the state to provide for a suspension of the judgment and nothing to prevent its making it costly in cases where the judgment is upheld."

Appellees respectfully assert that Miss. Code Ann. § 11-3-23 (1980 Supp.) is rationally based on legitimate interests which are achieved by the statute. The statute in question does not violate the Equal Protection or Due Process Clauses of the Fourteenth Amendment of the United States Constitution.

Respectfully submitted,

/s/ MICHAEL B. MCMAHAN
Michael B. McMahan
Of Counsel for Appellees

CERTIFICATE

I, Michael B. McMahan, of counsel for Appellees in the above styled and numbered cause, do hereby certify that a true and correct copy of the above and foregoing Appellee's Brief in Response to Motion of Appellant to Correct Mandate has been mailed, postage prepaid, to Hon. Carey R. Varnado and to Hon. S. Wayne Easterling, of counsel for Appellant, P. O. Box 3270, Hattiesburg, MS 39401.

This the 2nd day of December, 1985.

/s/ MICHAEL B. MCMAHAN
Michael B. McMahan
Of Counsel for Appellees

MICHAEL B. MCMAHAN
MCMAHAN AND MCMAHAN
ATTORNEYS AT LAW
POST OFFICE BOX 31
HATTIESBURG, MS 39401
(601) 544-8680

Of Counsel for Appellees

APPENDIX J

IN THE CIRCUIT COURT OF
FORREST COUNTY, MISSISSIPPI

Case Number 12-81-716

CAROLYN MILLER and
MARVIN RAMSEY MILLER, SR.,

Plaintiffs

versus

NATIONAL LIFE AND ACCIDENT
INSURANCE COMPANY,

Defendant

MOTION FOR JUDGMENT, CORRECTED JUDGMENT, OR NEW TRIAL

COMES the remaining defendant, National Life and Accident Insurance Company, in the above styled and numbered cause and moves the Court to set aside the verdict of the jury and the judgment thereon and to grant to said defendant judgment as a matter of law, or, in lieu thereof, a new trial, or, in lieu thereof, a corrected judgment where the amount will have been reduced to the extent needed and necessary and just to conform to what would be reasonable in amount, if any damages should be awarded, and in support thereof said defendant shows unto the Court the following, to-wit:

I.

That the Court should have sustained motion for directed verdict for said defendant at the conclusion of plaintiffs' testimony as to punitive damages.

II.

That the Court should have sustained motion for directed verdict for said defendant at the conclusion of plaintiffs' testimony as to actual damages.

III.

That the Court should have directed verdict for the said defendant at the conclusion of all the testimony and after both sides had rested, as to punitive damages.

IV.

That the Court should have directed verdict for the said defendant at the conclusion of all the testimony and after both sides had rested, as to actual damages.

V.

That the Court should have granted requested written peremptory instruction for this said defendant as to actual damages.

VI.

That the Court should have granted requested written peremptory instruction for this said defendant as to punitive damages.

VII.

That the Court was in error in refusing to admit testimony on objections of the plaintiffs, and the testimony which should have been admitted is disclosed through the record of testimony in the cause.

VIII.

That the Court was in error in admitting testimony for each of said plaintiff over the objections of the defendant, as disclosed through the record of testimony in the cause.

IX.

That the Court was in error in refusing to allow counsel for the defendant to withdraw from representation of one or both defendants to avoid a conflict of interests.

X.

That the Court was in error in allowing testimony of plaintiffs after counsel for plaintiffs had requested that the rule against witnesses remaining in the courtroom be invoked and then called Lavern Dillon as an adverse witness prior to testimony of the plaintiffs while said plaintiffs remained in the courtroom.

XI.

That the Court erred in overruling motion to direct a verdict for said defendant as to plaintiff Carolyn Miller despite there being no contractual relationship or responsibility of the defendant to said plaintiff.

XII.

That the Court was in error in allowing counsel for the plaintiff to offer re-direct testimony by Carolyn Miller on matters that were not brought in either direct exmaination or cross-examination and which resulted in a great prejudice to the defendant.

XIII.

That the instructions granted by the Court to the plaintiffs are not supported by the law or the facts as reflected in defendant's objections thereto as diclosed through the record of testimony in the cause.

XIV.

That the Court was in error in refusing certain instructions requested by the defendant as disclosed through the record in the cause.

XV.

That the verdict of the jury is contrary to the law and the evidence.

XVI.

That the verdict of the jury is against the overwhelming weight of the testimony and there is no testimony whatsoever to justify a verdict for punitive damages.

XVII.

That, if the plaintiffs were entilted to recover anything whatsoever in the cause, which is denied, the verdict is excessive and evidences that the jury was biased and prejudiced against said defendant.

XVIII.

That the verdict of the jury was based upon testimony not sufficient in law to justify or permit recovery or judgment for any amount whatsoever.

XIX.

That the Court was in error in ruling that knowledge and actions of defendant's soliciting agent was knowledge and action of the defendant in view of plaintiff's knowledge that the said agents were acting contrary to instructions and giving false information to defendant, and the principle of estoppel applies to make it so that plaintiffs are prohibited from using against defendant knowledge that said soliciting agents were not making truthful statements to defendant at a time when the claim was being processed.

XX.

That the Court was in error in allowing certain closing arguments by counsel for plaintiff in arguments to the jury, said arguments being in violation of the "golden rule,"

inflammatory, and which unduly emphasized the testimony of one witness to the exclusion of others.

XXI.

That the Court was in error in failing to sustain motion for mistrial as a result of the inflammatory arguments by counsel for plaintiffs.

XXII.

That the instructions granted to the plaintiffs over objections by defendant were peremptory in nature and required the defendant to meet an impossible burden in support of its contentions.

XXIII.

That the Court was in error in instructing the jury that any acts of soliciting agents of the defendant were imputed to said defendant in view of the superior knowledge by plaintiffs.

XXIV.

That the Court was in error in allowing the admission of recorded telephone conversation and in unduly emphasizing said recording by allowing a transcript of the recording to be introduced into evidence.

Respectfully submitted,

/s/ S. Wayne Easterling
Of Attorneys for Defendant

Easterling & Varnado
Post Office Box 870
Hattiesburg, Mississippi 39401
(601) 583-3522

CERTIFICATE

A true copy of the foregoing motion for judgment, corrected judgment or new trial has been mailed, postage prepaid, to the Honorable Michael B. McMahan, Post Office Box 31, Hattiesburg, Mississippi 39401, attorney for plaintiffs. on this 19th day of November, A. D., 1982.

/s/ S. Wayne Easterling

APPENDIX K

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

Number 54,702

NATIONAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant

versus

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.,

Appellees

BRIEF FOR APPELLANT

EASTERLING AND VARNADO
Post Office Box 870
Hattiesburg, Mississippi 39401

Attorneys for Appellant

INDEX

Page

I. General Statement 80a

II. Statement of Pleadings 82a

III. Testimony on Motion 84a

IV. Statement of Facts 86a

A. For the Plaintiffs 86a

Lavern Dillon 86a

Carolyn Miller 87a-89a

Marvin Ramsey Miller, Sr. 89a

B. For the Defendant 89a

Lavern Dillon 89a-90a

Joe Blount 90a-91a

Martin Brashier 91a

Benton M. Shoemake 91a-92a

V. Argument 92a

1. Appellant Is Entitled To Judgment As A Matter Of Law On The Claim For Punitive Damages 93a

Consolidated Am. Life Ins. Co. v. Toche, 410 So.2d 1303 (Miss. 1982) 93a

Mutual Benefit Health and Acc. Ass'n of Omaha, Nebraska v. Moor, 120 So.2d 439 (Miss. 1960).. 94a

Coffey v. Standard Life Insurance Co. of the South, 120 So.2d 143 (Miss. 1960) 94a

Deposit Guaranty Nat. Bank of Minnesota Mut. Life Ins. Co., 369 F.Supp. 8 (Miss. 1973) 94a

Lincoln Nat. Life Ins. Co. v. Crews, 341 So.2d 1321 (Miss. 1977) 94a

3 Am Jur 2d, Agency, § 286, 648 ..... 96a

44 Am Jur 2d, Insurance, § 1632, 630 ..... 96a

44 Am Jur 2d, Insurance, § 1633, 631 ..... 96a-97a

Pacific Insurance Company of N. Y. v. Lovern, 180 So.2d 290 (Miss. 1965) 97a

Springfield Fire & Marin Ins. Co. v. Nix, 138 So. 2d 598 (Miss. 1932) 97a-98a

Reserve Life Insurance Co. v. Brunson, 172 So.2d 571 (Miss. 1965) 98a

2. THE COURT ERRED IN FAILING TO ALLOW COUNSEL TO WITHDRAW THEIR REPRESENTATION OF LAVERN DILLON AND IN FAILING TO GRANT A CONTINUANCE TO AVOID A CONFLICT OF INTEREST 99a

7 Am Jur 2d, Attorneys at Law, § 49, 105 ....100a

3. THE COURT ERRED IN FAILING TO DIRECT A VERDICT FOR THE DEFENDANT AS TO CAROLYN MILLER BECAUSE UNDER THE CONTRACT OF INSURANCE MARVIN RAMSEY MILLER, SR., WAS THE ONLY PARTY ENTITLED TO RECOVER ACTUAL DAMAGES 100a

Krebs by and through Krebs v. Strange, 419 So.2d 178 (Miss. 1982).....101a

4. THE COURT ERRED IN ALLOWING TAPE RECORDED TELEPHONE CONVERSATION INTO EVIDENCE, WHICH ERROR WAS MAGNIFIED BY THEN ALSO ALLOWING A TRANSCRIPTION OF THE CONVERSATION INTO EVIDENCE 101a

Netterville v. Mississippi State Bar, 397 So.2d 878 (Miss. 1981) 102a

Bruske v. Arnold, 254 N.E.2d 453 (Ill. 1969) ..102a

5. Certain Procedural Errors Justify Reversal.102a

6. Certain Instructions Granted To The Plaintiffs Constituted Error 104a

Prudential Insurance Co. of Am. v. Estate of Russell, 274 So.2d 113, (Miss. 1973) 104a

Old Colony Insurance Co. v. Fagan Chevrolet Co., 150 So.2d 172 (Miss. 1963) 106a

7. Improper Closing Arguments Were Made By Attorney For Plaintiffs 107a

Shell Oil Company v. Pou, 204 So.2d 155 (Miss. 1967) 108a

Danner v. Mid-State Paving Company, 173 So. 2d 608 (Miss. 1965) 109a

Brush v. Laurendine, 150 So. 818 (Miss. 1933).109a

8. The Amount Of The Punitive Damages Award Was Excessive 109a

Snowden v. Osborne, 269 So.2d 858 (Miss. 1972).109a

Conclusion 110a

Certificate 111a

LIST OF CASES

Page

Brush v. Laurendine, 150 So. 818 (Miss. 1933) 109a

Bruske v. Arnold, 254 N.E.2d 453 (1969) 102a

Coffey v. Standard Life Insurance Co. of the South, 120 So.2d 143 (Miss. 1960) 94a

Consolidated Am. Life Ins. Co. v. Toche, 410 So.2d 1303 (Miss. 1982) 93a

Danner v. Mid-State Paving Company, 173 So.2d 608 (Miss. 1965) 109a

Deposit Guaranty Nat. Bank v. Minnesota Mut. Life Ins. Co., 369 F.Supp. 8 (Miss. 1973) 94a

Krebs by and through Krebs v. Strange, 419 So.2d 178 (Miss. 1982) 101a

Lincoln Nat. Life Ins. Co. v. Crews, 341 So.2d 1321 (Miss. 1977) 94a

Mutual Benefit Health and Acc. Ass'n of Omaha, Nebraska v. Moor, 120 So.2d 439 (Miss. 1960) 94a

Netterville v. Mississippi State Bar, 397 So.2d 878 (Miss. 1981) 102a

Old Colony Insurance Co. v. Fagan Chevrolet Co., 150 So.2d 172 (Miss. 1963) 106a

Pacific Insurance Company of N. Y. v. Lovern, 180 So.2d 290 (Miss. 1965) 97a

Prudential Insurance Co. of Am. v. Estate of Russell, 274 So.2d 113, (Miss. 1973) 104a, 105a,107a

Reserve Life Insurance Co. v. Brunson, 172 So 2d 571 (Miss. 1965) 98a

Shell Oil Company v. Pou, 204 So.2d 155 (Miss. 1967) .108a

Snowden v. Osborne, 269 So.2d 858 (Miss. 1972) 109a

Springfield Fire & Marine Ins. Co. v. Nix, 138 So. 598 (Miss. 1932) 97a-98a

TEXTS

3 Am Jur 2d, Agency, § 286, 648 ..... 96a

7 Am. Jur 2d, Attorneys at Law, § 49, 105 .....100a

44 Am Jur 2d, Insurance, § 1632, 630 ..... 96a

44 Am Jur 2d, Insurance, § 1633, 631 .....96a-97a

BRIEF FOR APPELLANT

I.

GENERAL STATEMENT

This appeal is from judgment rendered against National Life and Accident Insurance Company awarding actual damages in the amount of $2,500.00 and punitive damages in the amount of $350,000.00. Marvin Ramsey Miller, Jr., the son of the plaintiffs, was born on February 3, 1975. He was immediately diagnosed as having a congenital heart condition and was under the constant care of physicians until his death from heart surgery complications on July 22, 1981. He was hospitalized from March 27, 1976, through April 10, 1976, for heart surgery and, as stated, was constantly being evaluated by the doctors at University Hospital in Jackson. Shortly before March, 1981, the doctors at the University Hospital advised his parents that additional major surgery was going to be necessary in the very near future. In March, 1981, definite arrangements were made to have this surgery in July, 1981. The child did not survive this surgery.

In response to an invitation, an agent and staff manager for National Life and Accident Insurance Company visited the Millers in their home for the purpose of taking application for life insurance. It is undisputed that these agents were soliciting agents without power to issue insurance on behalf of the company. Mr. Miller was not at home at the time the agents arrived on March 12, 1981; and Joe Blount read the application to Mrs. Miller and filled in her responses. After Mrs. Miller signed the application, it was left at her house over night so that her husband could sign; and when this was accomplished, the application was forwarded on to the home office. A life insurance policy was issued insuring Marvin Ramsey Miller, Sr., in the amount of $5,000.00, his insured spouse in the amount of $5,000.00, and the child in the amount of $2,500.00.

Three questions and answers thereto on the application have direct bearing on the lawsuit. Question No. 24 requires answer as to whether any proposed insured had been treated by a doctor or hospitalized within the preceding five years. Question No. 26 requires answer as to whether any proposed insured had ever been diagnosed as having a heart condition. Question No. 28 gives substantial space to explain affirmative answers to question No. 24 and question No. 26.

A classic factual dispute developed in regard to question 24. The two agents involved, Joe Blount and Lavern Dillon, testified unequivocally that Mrs. Miller gave a negative answer to question 24. She disputed this and testified that she gave a positive answer. Both the agents and Mrs. Miller stated that on question 26 she did tell them that her son had a heart murmur at birth. The agents stated that she advised them that the child was now fine and had, while answering question 24, advised them that the child had not been hospitalized or treated for this condition within the past five years. Mrs. Miller disputed this. In any event, agent Blount did record a negative answer to question 26. Question 28 was left blank. The application was signed by both Mr. and Mrs. Miller; and pursuant to the application, the policy of insurance was issued by the company.

After the death of their son, agent Dillon assisted the Millers in filling out the needed forms and in obtaining a death certificate. This certificate listed the cause of death as heart failure due to a congenital heart anomaly. At this point, the company began conducting an investigation and eventually received detailed records from the University Hospital. Three separate inquiries were made by the company to determine from agents Blount and Dillon if any information by the insureds concerning the child's heart condition was given while the application was being taken. On all three occasions, Dillon answered in the negative.

During this time, agent Dillon was in contact with Mrs. Miller on several occasions, and on these occasions he was not aware of the child's past medical history. He advised Mrs. Miller that he was telling the company that she had not told him about the child having a heart murmur at birth and advised her to tell the company that she had given him all the information. Finally, on December 5, 1981, the two plaintiffs met with their attorney; and Mrs. Miller, from the attorney's office, placed a telephone call to agent Dillon. This call was recorded without his permission or knowledge; and the recording was played before the jury and a transcript was introduced, all over objections. In this recorded telephone conversation, he told Carolyn Miller that he was going to tell the company that she had not told him anything about the heart murmur and instructed her to tell the company that she had given Dillon all the information. Later that month, an agent of the company called Mrs. Miller to make an appointment to discuss the investigation further, and at that time she advised the company that she had an attorney and would not discuss the matter further. Suit was filed immediately thereafter.

II.

STATEMENT OF PLEADINGS

Carolyn Miller and Marvin Ramsey Miller, Sr., filed suit against National Life and Accident Insurance Company, a Tennessee corporation and Lavern Dillon, its alleged agent, seeking recovery of actual damages in the amount of $52,500.00 and punitive damages in the amount of $500,000.00. It was alleged that National Life issued a policy insuring the life of Marvin Ramsey Miller, Jr, the son of the plaintiffs, in the amount of $2,500.00, with the policy being issued on April 10, 1981. It was further alleged that Marvin Ramsey Miller, Jr., died on July 22, 1981, and that the defendant insurance company willfully refused to

pay the $2,500.00. Plaintiffs charged that this caused them to suffer attorney fees, mental and emotional distress, and other actual damages in the amount of $50,000.00 in addition to the $2,500.00.

A joint answer was filed by the two defendants wherein it was admitted that the policy was issued and that Marvin R. Miller, Jr., did die on July 22, 1981. It was affirmatively alleged that, after the death of the plaintiffs' son, National Life received hospital records from University Hospital in Jackson. These records disclosed that the deceased had been hospitalized from February 10, 1975, through February 13, 1975, for a congenital heart disease. This hospitalization was within one week after his birth on February 3, 1975. He was again hospitalized from March 27, 1976, through April 10, 1976, for heart surgery and had been under constant medical care at University Hospital since then. It was claimed that the reason for denial was that the true facts concerning the deceased's medical condition had been misstated and that the policy would not have been issued if the true facts had been given (A. 1).

The application for the policy was attached as an exhibit and both plaintiffs signed the application on March 12, 1981, which gave negative answers to the following questions:

> "Has any Proposed Insured (or Provider) within the past five years consulted with or been treated by a doctor, or been confined to any hospital?
>
> "Has any Proposed Insured (or Provider) ever consulted with or been treated by a doctor for, or been told by a doctor he had. . . . b. disease of the heart, blood, lungs, kidneys, digestive system or brain or nervous system?

An additional space on the application was provided so that details could be furnished to any affirmative answers

to questions 24 through 26. This space was left blank. It was further denied that defendants failed to act in good faith and affirmatively alleged that the defendants had justifiable reason for refusing to pay (A. 2).

On November 8, 1982, the day before the case had been set for trial, attorneys for the defendants filed two motions. The first was motion allowing the attorneys to be relieved as counsel for Lavern Dillon. The basis for the motion was that the plaintiffs' attorney on that date furnished said attorneys with a transcribed copy of a recorded telephone conversation between Dillon and Carolyn Miller. The second motion was filed by National Life and Accident Insurance Company requesting a continuance in order to resolve a potential conflict of interest. The following day, prior to proceeding, the court stated into the record that counsel for the defendants had requested an opportunity to offer proof on these motions prior to proceeding further. However, the court orally overruled both motions, ordered counsel to continue, and advised that it would give the defense attorneys an opportunity to develop a record later (A. 2).

III.

TESTIMONY ON MOTION

After voir dire, the defendants were offered an opportunity to offer testimony in support of the two motions that had previously been overruled by the court. The testimony was offered outside the presence of the jury and consisted of the testimony of the two agents and of defense attorney Wayne Easterling. The two agents testified that their contracts of employment authorized them to solicit applications for insurance and to collect premiums but prohibited them from issuing policy. The two agents were invited to the Millers' home, and agent Blount read the

application to Mrs. Miller and recorded her answers. She gave a negative answer to question 24, and when question 26 was read she stated that the child did have a heart murmur at birth. Agent Dillon testified that he did advise the company in writing on three occasions that the questions on the application were recorded as answered and that this was not quite true. He further told Carolyn Miller that she should tell the insurance company that she had told him about the heart condition and he told her that he would tell the insurance company that he did not know anything about the child's condition (A. 3).

Attorney Wayne Easterling testified that his law partner, M. M. Roberts, first handled this file. After the death of Mr. Roberts, Mr. Easterling took over the file. All the information in the file indicated that there was no conflict in the positions of Dillon and National Life. However, approximately two weeks before the trial date he learned for the first time that agent Dillon was going to testify that in taking the application Mrs. Miller used the words heart "murmur" or some noise in the child's chest in relating to him her child's problem. On the day before the trial, he was given a copy of a transcript by the attorney for the plaintiffs that revealed for the first time that Dillon was going to tell the company that Mrs. Miller had told him everything about a heart condition, and for the first he learned that Dillon had had prior dealings with the plaintiff and was telling the insurance company differently than what he had told the plaintiffs (A. 4). Immediately upon discovering this information, a motion was filed by the attorneys to withdraw as counsel for Dillon citing a conflict of interest. It was his professional opinion that the defenses between Dillon and the insurance company were inconsistent and it was impossible to adequately represent the interests of both defendants (A. 5).

IV.

STATEMENT OF FACTS

A

For the Plaintiffs

Lavern Dillon (A. 5-7). The first witness called for the plaintiffs was Lavern Dillon who was called in an adverse capacity (A. 5-7). Dillon testified that he and his staff manager, Joe Blount, took the application from Carolyn Miller. It was his opinion that a heart murmur was something very insignificant. However, if a baby had been treated for a heart murmur for six years, then this became a very significant item (A. 6). He assisted Mrs. Miller in processing the death claim and soon found out that the company had questions about the claim. He was asked to respond in writing to the company as to whether all questions had been answered truthfully. At the time, he thought that they had been because he considered the heart murmur so insignificant (A. 7). The primary reason for this was that Mrs. Miller had already responded on a previous question that the child had not been treated by a doctor or been hospitalized within the past five years (A. 7).

Dillon did not know when Carolyn Miller called him on December 5, 1981, that other persons were present and that the call was being recorded. He told her in this statement, which was introduced over objection, that she was going to tell the company that Mrs. Miller had not told him anything about the heart murmur. He told her to tell the company that she had given him all the information, but he explained this by stating that he still thought that the child only had a heart murmur which had remained untreated for five years (A. 9).

Carolyn Miller A. 7-10). Mrs. Miller had requested that a friend of hers have that friend's insurance agent stop by her house to discuss insurance. In response to this re-

quest, Lavern Dillon and Joe Blount came to her home. When the application was taken, Joe Blount read the questions and wrote down the answers given him. Mrs. Miller stated that she correctly answered question 24 by stating that her son had been under a doctor's care and had been hospitalized for surgery and was still under the doctor's care (A. 7-8). Her son was born with a heart murmur and had a catherization performed in July, 1981. He was constantly under a doctor's care from his birth until his death (A. 7). She stated that doctors had always used the term "heart murmur" to explain her son's condition. The child died July 22, 1981, and she informed Lavern Dillon about his death shortly after that. He assisted her in compiling the necessary papers to present to the insurance company. Someone from the company came to her place of work and asked her questions. When the insurance company would not let her know anything definite, she went to her attorney's office on December 5 and called Lavern Dillon from his office.

She was a single parent, not married to Marvin Ramsey Miller, Sr., until either 1978 or 1979. From the time of her son's birth in 1975 until her marriage, she was the sole support of the family and thus eligible for Medicaid benefits. When she married, these benefits were cut off and she decided that medical and life insurance was needed for the child (A. 8). The child had been born sick and was taken immediately to the University Hospital in Jackson for treatment. She was told by the personnel at that hospital that he had an extremely serious heart condition and that surgery would probably be necessary later. He did have surgery in late March, 1976, to replace an artery in his heart, and shortly before March, 1981, she was told that additional major surgery was going to be necessary in the very near future. Sometime in March she returned to the doctor and a definite appointment was made to have major surgery in July. The child did not survive this surgery (A. 8-9).

Dillon and Blount advised her that the application for insurance would have to be sent to the home office of the company for final approval. She did sign the application, and the application does state that no member of the family had been treated by or consulted with a doctor or confined in a hospital within five years. The application was attached to the policy when it was received by her several days after it was signed; and she noticed that the application was incorrectly filled out during the latter part of November, 1981. Dillon had told her, prior to her going to her lawyer on December 5, 1981, that he was telling the company that he did not know about her son's heart murmur. He told her to tell the insurance company that she had told him everything. She was aware that the company was conducting an investigation into the situation, and she made no attempt to contact anyone with the company other than Dillon. She tape recorded a telephone conversation with Dillon in her lawyer's office at his instructions without Dillon being aware of the recording. In this recording, Dillon told her that he was not being truthful to the company and that the company was still conducting an investigation to determine whether it would pay the claim. (A. 9)

In late December, 1981, an agent of the company called her to make an appointment to discuss the matter, and she told him that she did not wish to discuss the matter further (A. 9).

She testified that she knew the insurance company would consider the child's heart condition when considering whether to issue the policy. She knew that the only information the company obtained concerning the application was that given to it on the application and by agent Dillon, and she knew all the time that the company was not being given correct information. She stated that she was not claiming that the insurance company acted in bad faith to her (A. 10).

Even though this matter had not been raised on direct or cross-examination, on re-direct the court, over objection, allowed the plaintiffs' attorney to ask her whether in her opinion the company was accusing her of lying and led her into saying that she was going to court to vindicate herself (A. 10-11).

Marvin Ramsey Miller, Sr. (A. 11-12). Miller stated that he had had some criminal problems in the past and had been confined in the penitentiary. He did not read and write very well and was not present when the application for insurance was taken. He decided to get insurance because Medicaid had stopped paying health benefits for their son, and he and his wife had decided that they needed some health insurance because of the financial strain resulting from their son's medical treatment. He did not read the application but did sign it. He made no attempt to contact anyone with National Life except Dillon (A. 11).

The plaintiff then rested, and several motions for directed verdicts were made. The court at first overruled motion to dismiss agent Dillon but then reversed itself and sustained motion for directed verdict as to him. All motions on behalf of the corporate defendant were overruled (A. 12).

B

For the Defendant

Lavern Dillon (A. 12-14). Dillon testified that he and Joe Blount went to Mrs. Miller's home to discuss insurance policies with her. She decided to take a whole life insurance policy, and on the particular policy no premium was charged for the additional coverage on the child. Joe Blount read the application to her; and when she came to question 24, which asked whether she or any proposed insured had been treated by a doctor or confined in a hospital within five years, she answered in the negative. On question 26, which asked whether any proposed insured had ever con-

sulted with or been treated by a doctor for certain conditions, she did answer that her son had "a minor heart murmur." She said that this was a condition he had at birth. Agent Blount then asked if the child was on medication, and she gave a negative answer. Blount then asked her whether the child had any problems with his condition now and she answered in the negative. She signed the application in their presence, but her husband's signature was needed, and so Dillon came back the next day to pick up the application which had been signed by Mr. Miller. Mr. Miller was asked by Dillon whether he and his wife had discussed the insurance application, and Dillon was advised that they had (A. 13). He first learned of the child's death when he visited the Miller home to collect a premium. He assisted the Millers in obtaining a death certificate; and in October, 1981, he received a letter from the home office which, among other things, asked whether he had any knowledge of the child's heart problem. He responded in writing that he did not (A. 13). At the time he was in a hurry and was answering the questions to the best of his ability. However, he was sent another set of questions and was again asked as to why the Millers believed that he was aware of their child's health history. He answered that he did not because he thought the problem was so minor as to not warrant a positive answer. He still was not aware of the hospital confinements and medical treatment rendered to the child (A. 13).

He had no idea that the telephone conversation with Mrs. Miller on December 9, 1981, was being recorded. When he mentioned that Mrs. Miller should tell the insurance company the truth, that she had told him everything about it, the "everything" to which he was referring was a heart murmur. He still was not aware of the medical records and thought that nothing else was involved (A. 14).

Joe Blount (A. 14-15). Joe Blount was employed as staff manager for National Life and supervised six agents. He

did not have authority to bind National Life on insurance coverage. It was part of his practice to spend about one week on a rotating basis with each agent taking applications. He was with agent Dillon when they went to the home of Mrs. Miller. She purchased both a medical and health policy and a family life policy. When he read question 24 to her, which asked if any proposed insured had been treated by a doctor or confined to a hospital within five years, her response was in the negative. When question 26 was asked, she did state that her child had a heart murmur at birth. She signed the application in their presence and made arrangements for Dillon to come back the next day to pick up the application with her husband's signature on it (A. 14). Blount himself had been advised that as a child he had a heart murmur. This never required any kind of treatment or hospitalization, and he identified his situation with that of the child's when he was told by Mrs. Miller that no treatment or hospitalization had been required within five years. He never told National Life about the heart murmur. He did not learn until considerably later about the child's true medical history (A. 15).

Martin Brashier (A. 15). Brashier was the district manager for National Life, and he solicited business but did not have the power to issue a contract of insurance (A. 15). He received a letter from National Life requesting that agent Dillon answer questions about the Miller claim and did send this letter to Blount and asked that Dillon answer it. After November 16, 1981, he had an opportunity to discuss this claim with Blount and was told by him that Mrs. Miller had told Blount that the doctor had noted a noise in the child's chest at birth, but that since that time the child had not had any medical treatment or any problem. This did not seem to be a problem to Brashier and thus he did not inform anyone in the home office of this (A. 15).

Benton M. Shoemake (A. 16-18). Benton Shoemake was second vice president for underwriting for National Life.

His job was to make the determination as to which applicants are eligible for insurance and which are not. The only information they had on which to make this decision was contained in the application. Had his company been aware of the true medical history of Martin Miller, Jr., it would not have issued the policy (A. 16).

In early October, 1981, his company received a death certificate listing the cause of the death of the child as heart failure due to congenital heart anomaly. At this point, the company did obtain the medical records which were reviewed by him along with the application. The information subsequently obtained was inconsistent with that on the application (A. 16-17).

Several inquiries were submitted to the agent, all of which were answered stating that the agent had no knowledge of the child's past medical history. In his opinion, the child was totally uninsurable and nothing in the file indicated that Mrs. Miller had advised the agent about the child having any kind of heart problem prior to the claim being denied (A. 16).

The company did not learn that the agents had been told that the child had a heart murmur until approximately two weeks before the trial. At that time, the company did offer to pay the amount of the coverage even though it did not feel that it had a legal obligation to do so (A. 17).

V.

ARGUMENT

The verdict against appellant is in two parts. The first part grants actual damages in the amount of $2,500.00. The second part of the verdict awards appellees punitive damages in the amount of $350,000.00. It is appellant's position in this appeal that it is entitled to a judgment n.o.v. on the question of both actual and punitives damages. If

mistaken in the above, appellant urges that is is entitled to judgment as a matter of law on the question of punitive damages and to a new trial on the issue of actual damages. If mistaken in this position, appellant urges that a new trial should be granted on both actual and punitive damages, or in the alternative, a new trial should be granted on the amount of punitive damages only.

1. Appellant Is Entitled To Judgment As A Matter of Law On The Claim For Punitive Damages.

In Mississippi, the law is clear that punitive damages are not recoverable for the breach of contract if the insurance company involved has an arguable reason for failing to pay a claim. The most recent statement of this principle is contained in *Consolidated Am. Life Ins. Co. v. Toche,* 410 So.2d 1303 (Miss. 1982):

> "We have attempted to make it clear that since punitive damages are assessed as an example and warning to others, they should be allowed only with caution and within narrow limits. If an insurance company has a legitimate reason or an arguable reason for failing to pay a claim, punitive damages will not lie." 410 So.2d at 1304.

It is respectfully submitted that there are several valid and/or arguable reasons for denial of the claim.

A

Carolyn Miller testified that she truthfully answered question 24. Lavern Dillon and Joe Blount testified that she did not. The vice president in charge of underwriting for the company testified that had the application advised that the child had been treated by a physician or hospitalized within five years, the true situation concerning the child's medical history would have been uncovered. He

further testified that had this condition been known, the policy would not have been issued. Simply put, this part of the case consisted of a classic disputed question of fact between appellant and appellees. It has long been recognized in Mississippi that if an insured fails to give true and complete answers either to the insurer's agent or on the application for insurance, and omits references to certain illnesses, treatment, or prior hospitalization, such conduct is sufficient to preclude recovery under the policy. See *Mutual Benefit Health and Acc. Ass'n of Omaha, Nebraska v. Moor*, 120 So.2d 439 (Miss. 1960); *Coffey v. Standard Life Insurance Co. of the South*, 120 So.2d 143 (Miss. 1960). It matters not whether the applicant believes the statement is true:

> "Under Mississippi law, if an applicant for insurance undertakes to make a positive statement of a fact material to the risk, such fact must be true, and it is not sufficient that he believes it to be true; otherwise, an insurance contract procured by such misrepresentation or concealment of material facts may be aborted by the insurer, particularly if the company would not have issued the policy had it known the truth." *Deposit Guaranty Nat. Bank v. Minnesota Mut. Life Ins. Co.*, 369 F.Supp. 8 (Miss. 1973).

In addition to the testimony of the agents, the application which admittedly contains incorrect information was retained by the plaintiffs overnight and was personally signed by both of them.

It is apparent that the jury rejected appellant's factual version of that which occurred. However, losing a factual dispute is not sufficient grounds to impose punitive damages. Such damages can only be imposed in the absence of an arguable factual or legal reason for refusing to pay. In *Lincoln Nat. Life Ins. Co. v. Crews*, 341 So.2d 1321 (Miss. 1977), the court held that an insurance company

making an unsuccessful factual defense was not subject to punitive damages:

> "There is nothing in the record capable of supporting a finding that Lincoln, in defending the suit and relying upon the provisions of the policy, acted other than in good faith. The mere fact that Lincoln rejected the claims under the provisions of its policy and defended the suit and lost does not justify imposition of punitive damages.
>
> "Punitive damages are not recoverable for breach of contract unless such breach is attended by some intentional wrong, insult, abuse or gross negligence which amounts to an independent tort." 341 So.2d at 1322.

B

Appellees argued that any knowledge of the soliciting agents obtained while filling in the application constituted knowledge to the appellant. Appellant admits that there are cases so holding. However, the alleged basis for punitive damages consisted of failure to pay without a just or arguable reason. It is undisputed that appellees had actual knowledge that agent Dillon was not being truthful to his principal. They were aware and had evidence that he was telling his principal that he had no knowledge of a prior heart condition. He was advising appellees to claim the contrary. It is improper for one who knows that the agent of a principal is not being truthful to the principal to profit by his superior knowledge. That is exactly what appellees seek to do. It was pointed out on cross-examination that Carolyn Miller knew the child's past medical history was something that would be considered by the insurance company. She knew that the insurance company's only source of information was Dillon, and she knew that he was giving the insurance company incorrect information. She made no attempt to get proof of this misrepresentation to appellant. She then admitted that she was not claiming that the insurance company acted in bad faith to her (A. 10).

The following quotation is from 3 Am Jur 2d, Agency, § 286, 648:

> "The rule imputing an agent's knowledge to the principal is designed to protect only those who exercise good faith, and is not intended to serve as a shield for unfair dealing by the third person. The rule may not be invoked where third persons use the agent to further their own frauds upon the principal or where the third person did not intend or expect that the agent would communicate the facts or the truth to the principal or where it is known to the third person that the agent is acting adversely to the principal or fraudulently so far as his interests are concerned."

The following quotation is from 44 Am Jur 2d, Insurance, § 1632, 630:

> "Thus, it has been held that if the applicant is a party to the fraud of the insurer's agent or in collusion with him, or has actual or constructive knowledge that his application contains false answers material to the risk, neither he nor the beneficiary under the policy will be allowed to profit thereby, and the insurer will not be estopped by the knowledge or conduct of its agent from asserting the falsity of such answers as a bar to its liability on the policy."

Section 1633 states:

> "The rule denying an insurer the right to assert the falsity of answers to questions contained in an application for insurance, and written into the application by the insurer's agent after the questions were correctly answered by the applicant, presupposes the continuance of good faith on the part of the insured; this rule is not applicable if there was any taint of fraud on the part of the insured in allowing incorrect answers to stand without objection. In other words, the rule

that the insured is not responsible for false answers in the application where they have been inserted by the agent through mistake, negligence, or fraud is not absolute, and applies only if the insured is justifiably ignorant or the untrue answers, has no actual or implied knowledge thereof, and has been guilty of no bad faith or fraud. If the insured, after the delivery of the policy, discovers that a fraud has been perpetrated by means of false answers, it becomes his duty to make the fact known to the company. Otherwise, through continuing to hold the policy, he may be deemed to approve the action of the agent, and thus becomes a participant in the fraud." 44 Am Jur 2d, Insurance, § 1633, 631-632.

C

Any knowledge that the agents might have gained would have application as to whether the policy was or was not in force, but would not be applicable to appellees' claim for punitive damages. The suit was in two parts. The first sought actual damages and a determination that the insurance policy was in force. The second sought determination that, in the event the policy was in force, the failure to pay was without arguable basis. The agents involved had no authority other than to collect premiums and solicit applications. As such, they were special agents and their action subsequent to taking of the application could not bind the company. *Pacific Insurance Company of N. Y. v. Lovern*, 180 So.2d 290 (Miss. 1965).

D

The application was made a part of the policy of insurance, and Mrs. Miller learned of this in November, 1981, prior to the claim being disallowed. No effort was made to get this information to the insurance company (A. 9). In *Springfield Fire & Marine Ins. Co. v. Nix*, 138 So. 598

(Miss. 1932), a proposed insured applied for property damage coverage for an automobile. The general agent for the insurer testified that he asked the proposed insured what the car cost him. The proposed insured testified that this was not so but that he was only asked what the car cost "new." In any event, it was undisputed that incorect information was contained in the application and that the application was part of the policy. The court stated the following:

> "The statements made by the assured to the insurer were warranties, and the insured nowhere denies but that he had read and knew the contents of his policy. At any rate, having retained the policy in his possession for more than a month, he knew, or ought to have known, the contents of it." 138 So. at 599.

In *Reserve Life Insurance Co. v. Brunson,* 172 So.2d 571 (Miss. 1965), the proposed insured had signed a blank application. This had been filled in by the agent, and she had received a copy of the application with the policy. The application did not include all of the proposed policyholder's relevant medical history, specifically omitting two hospital confinements. The insurer refused to pay benefits under the policy and claimed the policy was void as a result of misrepresentations:

> ". . . 'Whether or not these previous ailments materially affected either the acceptance of the risk or the hazard assumed by the company was, in our opinion, a question of fact and an issue for the determination of the jury. Fidelity Mutual Life Insurance Co. v. Miazza, 93 Miss. 18, 46 So. 817; Fidelity Mutual Life Insurance Co. v. Miazza, 93 Miss. 422, 48 So. 1017 (Hn 3).' The appellant offered no proof as to whether the omissions materially affected either the acceptance of the risk or the hazard assumed by the insurer, but relied solely upon the admission of the appellee to the

effect that she knew the application blanks were false and insufficient and thereby was barred from recovery. The issue was therefore not submitted to the jury." 172 So.2d at 574.

The case thus involved novel legal issues and unresolved factual differences, any one of which constituted an arguable basis for denial. It is, therefore, submitted that peremptory instruction should have been sustained on the issue of punitive damages. Also, appellant urges that the legal principles set forth above justify peremptory instruction on the issue of actual damages as well.

2. The Court Erred In Failing To Allow Counsel To Withdraw Their Representation Of Lavern Dillon And In Failing To Grant A Continuance To Avoid A Conflict Of Interest.

A lawyer has a duty to exercise independent professional judgment on behalf of a client. Likewise, each client is entitled to be represented by an attorney in a position to exercise completely independent professional judgment. In the case at bar, the ruling of the court frustrated this right. The day before the trial defense counsel learned for the first time that Dillon had been telling Mrs. Miller that he knew about the prior condition and was telling the company the opposite (A. 4-5). A motion to withdraw as counsel because of a conflict of interest was immediately filed, as was a motion for a continuance. It was urged that the defenses between the two defendants were inconsistent in several areas. First, Dillon was not being completely truthful to his principal. Second, he had had prior dealings with the plaintiffs and had advised them that he was telling the insurance company one version and them another. He was also giving the plaintiffs advise. Defense counsel was then in a position that the interests of the insurance company required that it be in a position to show that Dillon had misrepresented things to the company. However, the duty

to Dillon conflicted with this position and made it impossible to adequately represent both clients.

> "The duty of a lawyer to exercise independent professional judgment on behalf of a client requires him to refuse to accept or continue employment if the interests of another client may impair such independent professional judgment, although a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment. Thus it is a ground for disciplinary action for an attorney to represent, without the knowledge or consent of all parties, parties with conflicting or adverse interests, as where a city or prosecuting attorney acts as counsel for persons having interests adverse to the interests of the public. Moreover, it is the duty of an attorney to reveal a conflict to a client and to obtain the client's consent before undertaking the representation." 7 Am Jur 2d, Attorneys at Law, § 49, 105.

3. The Court Erred In Failing To Direct A Verdict For The Defendant As To Carolyn Miller Because Under The Contract Of Insurance Marvin Ramsey Miller, Sr., Was The Only Party Entitled To Recover Actual Damages.

The policy of insurance provided on its face that Marvin R. Miller, Sr., was the insured. Under that heading, Carolyn Miller was listed as the "insured spouse." By the plain terms of the policy, death benefits for the child were payable to Marvin R. Miller, Sr., if living, and otherwise to Carolyn Miller. This was specifically pointed out to the court in request for directed verdict at the conclusion of plaintiffs' case. This motion was overruled by the court, and the jury brought back a verdict for both plaintiffs on both actual and punitive damages (A. 12).

An insurance policy is a contract, and the same general rules of interpretation applying to other contracts apply to policies of insurance. *Krebs by and through Krebs v. Strange,* 419 So.2d 178 (Miss. 1982). Under the clear terms of the contract, National Life and Accident Insurance Company had no obligation to Carolyn Miller except at the death of Marvin Ramsey Miller, Sr. Despite her having no rights under the policy, she was allowed to testify at length as to her damages and the jury was entitled to consider her claims in establishing the amount of punitive damages. It was also entitled to consider that she and her husband both should be compensated, and an examination of the record as a whole reveals that the primary thrust of plaintiffs' case was to utilize her as an object of sympathy, rather than her husband. It is respectfully submitted that the failure to sustain directed verdict as to Carolyn Miller's claim justifies reversal and a retrial. The court itself recognized this point and attempted to reconcile its ruling by holding that the application itself rather than the policy was ambiguous. It is respectfully submitted that this holding constituted error.

4. The Court Erred In Allowing Tape Recorded Telephone Conversation Into Evidence, Which Error Was Magnified By Then Also Allowing A Transcription Of The Conversation Into Evidence.

At a time when defendant was investigating the claim filed by the plaintiffs, the two plaintiffs employed their attorney to represent them. On that date, at their attorney's direction, with Mr. Miller and their attorney listening in, Carolyn Miller placed a call to Lavern Dillon. He was not advised that the telephone conservation was being recorded; and after the call was made, the recording was preserved and, in fact, transcribed. The court allowed the recording to be played for the jury and then compounded the situation by allowing to be received into evidence and

taken into the jury room a transcription of the recording (A. 9).

This conduct was objected to by the defendant without success. Frankly, appellant does not wish to fully discuss the propriety of such conduct. The point was last raised in *Nettervile v. Mississippi State Bar,* 397 So.2d 878 (Miss. 1981). Evidence illegally obtained is ordinarily not admissible in a civil case. *Bruske v. Arnold,* 254 N.E.2d 453 (Ill. 1969). Admitting it in the case at bar justifies reversal.

5. Certain Procedural Errors Justify Reversal.

It should be stated that the trial court has much discretion in its ruling. However, there is a point beyond which the trial court cannot go, particularly when several rulings standing alone would not justify reversal but have a cumulative effect on the overall result.

In the case at bar, the plaintiffs requested that the rule concerning exclusion of witnesses be invoked. Lavern Dillon was called as an adverse witness even though no serious effort was made by the plaintiffs to oppose motion for directed verdict on his behalf. Both plaintiffs remained in the courtroom during his testimony. Both plaintiffs were allowed to testify over objection after hearing his testimony (A. 7).

The attorney for the plaintiffs, at a time when he was questioning Benton Shoemake with no objection pending from the defendant and simply as an unsolicited statement before the jury which could not possibly be confused as an attempt to ask a question, made the following statement:

> "Judge, I don't know about objecting, but I am offended that they didn't furnish Mr. Shoemake's name in the interrogatories." (A-17)

Counsel for the defendant then requested that the court disregard this statement by Mr. McMahan, which request was refused by the trial judge (A. 17).

During Carolyn Miller's direct examination, the plaintiff gave her version of the factual events surrounding the issuance of the policy. Cross-examination was restricted to these issues. However, the plaintiff then, on re-direct examination, granted plaintiffs' attorney astonishing latitude in asking leading questions and in opening up new issues that had not been raised on either direct or cross-examination. Sample questions are set forth below, and it should be kept in mind that these issues were being raised for the first time on re-direct:

> "Can you tell the jury whether or not all along it was your understanding that the company was accusing you of lying?"

Objection was made on the basis of leading, not rebuttal, and that the question called for mental impression. The objection was overruled.

The witness was then asked:

> "Carolyn, Mr. Easterling has asked you all sorts of questions about what your understanding was and what this was and what that was. Has it been your understanding that up until today, or yesterday when we voluntarily furnished them this tape, that they were calling you a liar?"

The witness was allowed by the court to answer, "Yes."

> "Can you tell the jury whether or not part of the coming to court is for you to vindicate yourself?"

This was objected to as being not in rebuttal, leading, and also calling for mental impressions. This was overruled, and the witness was allowed to answer (A. 10).

6. Certain Instructions Granted To The Plaintiffs Constituted Error

Instruction P-7 (A. 19-20) incorrectly stated the wrong standard of proof required of the defendant. The instruction stated that the defendant "have(*sic*) the burden of proving by positive, clear, and convincing testimony that the plaintiffs willfully made fraudulent responses of material facts in response to questions contained in the application for insurance; and if the defendant fail(*sic*) to prove by positive, clear and convincing testimony that the plaintiffs did willfully supply fraudulent responses of material facts to the questions contained in the application for insurance, then you shall return a verdict for the plaintiffs on the contractual damages."

The defendant defended on the basis of misrepresentation or concealment in the application. In *Prudential Insurance Co. of Am. v. Estate of Russell,* 274 So.2d 113 (Miss. 1973), the plaintiff deceased applied for life insurance. A question was asked on the application as to whether he had, within the past three months, consulted with or been under the care of a doctor for cancer. He answered in the negative. After his death, it developed that he had been treated by a doctor for cancer, but it was not certain that he had known that the treatment was for that specific disease. The insurance company defended on the basis of misrepresentation. In reversing a judgment for the plaintiff, the Court stated the following:

> " ' "The application and the policy, constituting but parts of an entire contract, are to be read as one instrument, and such construction is to be adopted as renders them harmonious. This is accomplished by giving the word 'fraud' its legal meaning, by which will be embraced misstatments by which the company has been deceived, though not fraudulently intended by the applicant. To limit it to designed and intentional bad faith is to do violence both to the letter and spirit

of the other portions of the instrument." In this case it can hardly be doubted, that if there had been a full disclosure on the part of Miazza as to the character of his illness in 1903, it might reasonably have influenced the company not to make the contract of insurance.

" 'The principle here applied to this contract is but a principle of general application. It is the universal rule that any contract induced by misrepresentation or concealment of material facts may be avoided by the party injuriously affected thereby. If the applicant for insurance undertakes to make a positive statement of a fact, if it be material to the risk, such fact must be true. It is not sufficient that he believes it true, but it must be so in fact, or the policy will be avoided, provided, always, that the misstatement be about a material matter.' " 274 So.2d at 116 quoting *Fidelity Mutual Life Insurance Company v. Miazza,* 93 Miss. 18, 46 So. 817 (1908), quoting *Co-operative Association v. Leflore,* 53 Miss. 1, 18.

The error in instruction P-7 is that the plaintiffs obtained an instruction requiring that the defendant affirmatively show common law fraud which must be proved by clear and convincing evidence. However, as was recognized in *Russell,* supra, the defendant does not have to meet the traditional test but rather must only prove misrepresentation by the "preponderance of the evidence" standard.

Instruction P-1 (A. 18) is basically a peremptory instruction against the defendant. The instruction tells the jury that if either agent failed to correctly write down answers to the questions propounded, then the policy cannot be invalidated. The defense of the company was based upon question 24 being incorrectly answered. The agents testified that Mrs. Miller gave a wrong answer when asked whether her son had been hospitalized or treated by a

physician within the preceding five years. The agents admitted that she answered question 26 by advising them that her son did have a heart murmur, a fact which they felt so insignificant as to not warrant further inquiry in view of her answer to question 24. However, the instruction states that if the plaintiffs gave a true answer which was incorrectly recorded to any question, then her omissions on other, material questions cannot be utilized by the defendant.

Instruction P-3 (A. 19) was in error because there was no basis for a punitive damage instruction. Also, the instruction did not advise the jury that the question of punitive damages was discretionary.

Instruction P-8 (A. 20) was erroneous because it instructed the jury that any knowledge of Lavern Dillon and Joe Blount was knowledge to the company. In an ordinary case this perhaps is the law, but defendant objected on the basis that such is not the proper test when the third party knows that the agent is not being truthful to the principal.

Instruction P-9 (A. 21) went one step beyond Instruction P-8. This instruction also instructed the jury that the actions of Lavern Dillon and Joe Blount, or M. L. Brashier, in adjusting the loss should be considered the actions of the company. The law in Mississippi is that soliciting agents are only agents up to the taking of the application and not after. The testimony was quite clear that the agents had no authority to adjust the claim, and the instruction simply is not supported by the law or facts. See *Old Colony Insurance Co. v. Fagan Chevrolet Co.*, 150 So.2d 172 (Miss. 1963).

The defendant requested a peremptory instruction on the issue of punitive damages. This instruction was refused. An instruction was requested advising the jury that if an applicant for insurance makes a positive statement of fact material to the risk, the statement must be true and it is not sufficient that the applicant believed the fact to be true.

This instruction was supported by the holding of this Court in *Prudential Insurance Co. of Am. v. Estate of Russell,* supra, and was important because Mrs. Miller, in her testimony concerning her knowledge of her child's condition, stated that all she knew about her son's condition was that her doctors had used the term "heart murmur" to explain her son's condition and that this is all she knew about his condition (A. 8). An instruction was requested advising that punitive damages are not favored by the law and are to be given only in cases in which the actions of the defendant are such that he should be punished in order to deter others. This was refused. An instruction was requested advising the jury that a soliciting agent cannot bind the company by acts or knowledge acquired subsequent to the issuance of the policy unless the company has authorized the act, ratified it or acquired the knowledge. All these requested instructions were refused by the court (A. 21-22). It is respectfully submitted that these instructions were very pertinent, were based upon applicable law, and that refusal to give them constituted reversable error.

7. Improper Closing Arguments Were Made By Attorney For Plaintiffs.

The defendant requested and obtained bill of exceptions to make part of the plaintiffs' attorney's closing argument part of the record (A. 22). During closing argument, plaintiffs' attorney stated the following:

> "I represent the lady sitting here at the table with me. I don't represent the insurance company, and I'm here because I'm sick of insurance companies ripping people off, and you ought to be sick of it, too."

In addition, plaintiffs' counsel made the following remark:

> "If you don't bring back a large sum of punitive damages, there will be a bunch of agents for this com-

> pany sitting around a board rom in Nashville laughing, saying, 'Thank God for Mississippi.'" (A. 22)

Both remarks were objected to by the defense, and the objection was in both cases overruled. A motion for mistrial was also made and overruled (A. 22).

More will be said about the size of the punitive damages award in the following section, but the attention of this Court is directed to the fact that the actual damages were $2,500.00 and the puhitive damages were $350,000.00. It is respectfully submitted that the amount of the verdict is some evidence that passion and prejudice were involved. It is also respectfully submitted that much of this was due to the closing argument. In *Shell Oil Company v. Pou,* 204 So.2d 155 (Miss. 1967), plaintiff was granted a punitive damage instruction. In reversing the verdict for the plaintiff, the Court stated the following:

> "The only legitimate purpose of the argument of counsel in a jury case is to assist the jurors in evaluating the evidence and in understanding the law and in applying it to the facts. Appeals to passion and prejudice are always improper and should never be allowed." 204 So.2d at 157.

The two remarks quoted above were improper. They constituted a blatant attempt to inflame and prejudice the jury against the corporate defendant and were in no way intended to assist the jury in evaluating the evidence, understanding the law, and applying it to the facts. Such conduct has ben condemned by the Court in *Pou,* supra, and other cases and should not be approved in the case at bar.

In addition, the first remark quoted above constituted an attempt to apply the "Golden Rule" argument which has repeatedly been condemned by this Court. Specific objection was made to the attempt to apply the "Golden Rule" argument, which was, likewise, overruled. The jury was asked

to apply its own personal feelings to the alleged conduct of the insurance company. Such attempt to inject the personal feelings and experiences of the jury into closing argument was condemned in *Danner v. Mid-state Paving Company*, 173 So.2d 608 (Miss. 1965).

In *Brush v. Laurendine*, 150 So. 818 (Miss. 1933), the Supreme Court of Mississippi stated that a bill of exceptions constituted the proper vehicle for getting objections to closing arguments into the record. Certain errors in argument to the jury could be cured by the trial judge's sustaining the objection thereto and directing the jury to disregard it. The record is clear that the trial judge did not follow this course. In *Laurendine*, supra, the objecting attorney was directed to move for mistrial if the error in closing argument was not corrected sufficiently. This course was followed in the case at bar, and the motion for mistrial was overruled. Appellant respectfully submits that the failures to instruct the jury to disregard the remarks in closing argument and to sustain motion for mistrial constituted reversable error.

8. The Amount Of The Punitive Damages Award Was Excessive.

Appellant readily admits that National Life and Accident Insurance Company is a large and successful company. It also admits that the amount of punitive damages is ordinarily left to the discretion of the jury. However, it is also respectfully submitted that there must be some basis between the amount of actual damages sustained and the amount of punitive damages awarded. Surely an award of actual damages in the amount of $2,500.00 followed by a punitive damages award in the amount of $350,000.00 exceds any rational connection between actual damages sustained and punitive damages granted. In *Snowden v. Osborne*, 269 So.2d 858 (Miss. 1972), the plaintiff was awarded an actual damages verdict in the amount of

$3,500.00 and punitive damages in the amount of $30,000.00 were awarded. The Supreme Court of Mississippi reversed the portion of the judgment granting punitive damages and remanded the case to the circuit court for further hearing upon the amount of punitive damages awarded. The Court expressed its longstanding reluctance to invade the province of the jury in awarding punitive damages "unless for exceptional causes." Appellant respectfully submits that exceptional causes exist in this case because of the large amount of the punitive damages verdict in relation to the actual damages sustained along with the prejudicial nature of closing argument.

CONCLUSION

Appellant urges this Court to grant it a judgment as a matter of law on the questions of both actual and punitive damages. If mistaken in the above, appellant respectfully submits that sufficient arguable reasons for failure to pay existed and it should be given judgment as a matter of law as to punitive damages and granted a new trial on the question of actual damages. If mistaken in that, appellant strongly believes that sufficient errors were committed in closing arguments and in the amount of the jury verdict awarded, that a new trial should be granted on all issues, or on the punitive damages only.

Respectfully submitted,

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CERTIFICATE

A true copy of the foregoing Brief for Appellant has been mailed to the Honorable Michael B. McMahan, Post Office Box 31, Hattiesburg, Mississippi 39401, attorney for appellees; Honorable Jack B. Weldy, Post Office Box 43, Hattiesburg, Mississippi 39401, former Circuit Judge, Twelfth Judicial District; and Honorable Richard McKenzie, Post Office Box 1403, Hattiesburg, Mississippi 39401, Circuit Judge, Twelfth Judicial District, on this 1st day of June, 1983, which is more than two days before the filing of said brief.

/s/ S. Wayne Easterling
S. Wayne Easterling, Attorney
for Appellant

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

Number 54,702

NATIONAL LIFE AND ACCIDENT
INSURANCE COMPANY,

Appellant

versus

CAROLYN MILLER AND
MARVIN RAMSEY MILLER, SR.,

Appellees

REPLY BRIEF OF APPELLANT

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INDEX

Page

1. APPELLANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE CLAIM FOR PUNITIVE DAMAGES ...115a

   Standard Life Ins. Co. of Indiana v. Veal, 354 So.2d 239 (Miss. 1977) 115a

   Lincoln Nat. Life Ins. Co. v. Crews, 341 So.2d 1321 (Miss. 1977) 116a

2. THE COURT ERRED IN FAILING TO ALLOW COUNSEL TO WITHDRAW THEIR REPRESENTATION OF LAVERN DILLON AND IN FAILING TO GRANT A CONTINUANCE TO AVOID A CONFLICT OF INTEREST 117a

3. THE COURT ERRED IN FAILING TO DIRECT A VERDICT FOR THE DEFENDANT AS TO CAROLYN MILLER BECAUSE UNDER THE CONTRACT OF INSURANCE MARVIN RAMSEY MILLER, SR., WAS THE ONLY PARTY ENTITLED TO RECOVER ACTUAL DAMAGES 118a

   Standard Life Ins. Co. of Indiana v. Veal, 354 So.2d 239 (Miss. 1977) 118a

4. THE COURT ERRED IN ALLOWING TAPE RECORDED TELEPHONE CONVERSATION INTO EVIDENCE, WHICH ERROR WAS MAGNIFIED BY THEN ALSO ALLOWING A TRANSCRIPTION OF THE CONVERSATION INTO EVIDENCE. 119a

   J. C. Penney Co., Inc., v. Blush, 356 So.2d 590 (Miss. 1978) 119a

5. CERTAIN PROCEDURAL ERRORS JUSTIFY REVERSAL 120a

6. CERTAIN INSTRUCTIONS GRANTED TO THE PLAINTIFFS CONSTITUTED ERROR 120a

   Interstate Life and Accident Ins. Co. v. Smith, 260 So.2d 453 (Miss. 1972) 121a

Prudential Insurance Co. of Am. v. Estate of Russell, 274 So.2d 113 (Miss. 1973) 122a

Standard Life Ins. Co. of Indiana v. Veal, 354 So.2d 239 (Miss. 1977) 122a

7. Improper Closing Arguments Were Made By Attorney For Plaintiffs 123a

8. The Amount Of The Punitive Damages Award Was Excessive 123a

Certificate 124a

TABLE OF CASES

Page

Interstate Life and Accident Ins. Co. v. Smith, 260 So.2d 453 (Miss. 1972) 121a

J. C. Penney Co., Inc., v. Blush, 356 So.2d 590 (Miss. 1978) 119a

Lincoln Nat. Life Ins. Co. v. Crews, 341 So.2d 1321 (Miss. 1977) 116a

Prudential Life Ins. Co. of Am. v. Estate of Russell, 274 So.2d 113 (Miss. 1973) 122a

Standard Life Ins. Co. of Indiana v. Veal, 354 So.2d 239 (Miss. 1977) 115a, 118a

REPLY BRIEF OF APPELLANT

This appeal is from judgment awarding $2,500.00 actual damages and $350,000.00 punitive damages. Appellant respectfully submits to this Court that the case involved novel questions of law and fact not previously decided by this Court. Several grounds for reversal were urged in appellant's brief. Appellees responded to these grounds in the order in which they were presented, and thus this reply will be in the same order.

1. Appellant Is Entitled To Judgment As A Matter Of Law On The Claim For Punitive Damages.

Appellees and appellant agree that *Standard Life Ins. Co. of Indiana v. Veal,* 354 So.2d 239 (Miss. 1977), and subsequent cases clearly hold that punitive damages will not lie if the insurance company has a legitimate and/or arguable basis for failure to pay. In this case, a classic "swearing match" developed between appellees and appellant, which admittedly was won by appellees. This contest pitted the testimony of Lavern Dillon and Joe Blount against that of Carolyn Miller. Dillon (A. 7) and Blount (A. 14) both testified that Blount read to Mrs. Miller the questions on the application for insurance. Question No. 24 required answer as to whether any proposed insured had been treated by a doctor or hospitalized within the last five years. Both testified that she had answered this question in the negative. Question No. 26 asked if any proposed insured had ever consulted with a doctor for certain conditions, including a disease of the heart. They admitted that Miller told them that the child had a heart murmur at birth, and their version was that she was asked whether the child was undergoing any kind of treatment at the present time. She again gave a negative answer to the agents. Since they knew from her previous answer to Question No. 24 that the child had not been treated within five years for the

condition, they gave a negative answer to this question on the application under this blank.

Mrs. Carolyn Miller testified that she did give affirmative answers to the questions which were incorrectly filled in on the application by Blount. Appellant cited several cases in its brief holding that if a prospective insured fails to give complete or true answers to questions concerning his health, the insurance company can invalidate the policy regardless of whether the applicant thought the statements were true. Thus, if the jury had accepted the factual version urged by appellant, National Life would have been entitled to prevail. The lower court recognized this in some of its instructions, and it is respectfully submitted that the law is clear on this point. The position of appellant is that punitive damages do not lie when an insurance company makes an unsuccessful factual defense. This position was recognized in *Lincoln Nat. Life Ins. Co. v. Crews,* 341 So.2d 1321 (Miss. 1977).

During the trial, appellees stressed that any knowledge to Dillon constituted knowledge to National Life. Dillon and Mrs. Miller had several conversations, and it was undisputed that Dillon advised Mrs. Miller that he was not telling the company that she had mentioned a heart murmur when the application was being completed. He advised her to tell the company that she had told him of the murmur. Appellant has no quarrel with the general statement concerning knowledge of a soliciting agent being knowledge to the principle. However, this rule was not designed to apply to the situation where the third party has information concerning the agent's acting adversely to the principal and who fails to disclose this information to the principal. It should be kept in mind that appellees had evidence that the agent was not being completely candid to his principal at a time when National Life requested a conference to discuss question of coverage, and appellant was advised that appellees did not want to discuss the matter further.

The common law in situations such as this is that such knowledge of the agent is not imputed to the principal. Again, it follows that appellant had an arguable basis for asserting that any knowledge of Dillon was not imputed to appellant, which forecloses the question of punitive damages.

2. The Court Erred In Failing To Allow Counsel To Withdraw Their Representation Of Lavern Dillon And In Failing To Grant A Continuance To Avoid A Conflict Of Interest.

On the day before the case was set for trial, the defense counsel discovered that Mrs. Miller and her attorney had tape recorded a telephone conversation with Dillon. In this conversation, Dillon referred to past dealings with the plaintiffs and urged them to tell the company one thing while he would tell them the opposite. This information revealed that plaintiffs were aware that Dillon was not making all information available to his principal, and this is what caused motion for continuance to be filed. Defense counsel felt strongly that they could not properly represent both clients because of the potential conflict that existed.

The plaintiffs called Dillon adversely as their first witness; and after being allowed to interrogate him adversely, they announced that there was no objection to his being dismissed through motion for directed verdict at the conclusion of their case in chief. By then, both plaintiffs had testified and defense counsel had been placed in a quandary of trying to properly represent both clients in examining the plaintiffs. Appellant had also been deprived of the right to question Dillon other than as its witness rather than to cross-examine him.

The overall result was that defense counsel was severely restricted in exercising independent professional judgment on behalf of two clients with conflicting interest.

3. The Court Erred In Failing To Direct A Verdict For The Defendant As To Carolyn Miller Because Under The Contract Of Insurance Marvin Ramsey Miller, Sr., Was The Only Party Entitled To Recover Actual Damages.

Appellant respectfully submits that the part of the policy providing for beneficiaries is in no way ambiguous. Marvin R. Miller, Sr., was the insured and Carolyn Miller was listed as the "insured spouse." The policy provided that all benefits were payable to Marvin R. Miller, Sr., if living, and otherwise to Carolyn Miller. The plaintiffs sued alleging that both were entitled to recover under the policy. This was denied by the defendant.

In *Standard Life Ins. Co. of Indiana v. Veal,* supra, the Supreme Court of Mississippi dealt with an entirely different set of facts than exist here. The Court held that a plaintiff who has a "beneficial interest" in the proceeds of an insurance policy should be allowed to sue even though a creditor of the plaintiff would also be a proper party in view of the wording of the policy. The Court held that if the policy was primarily for the benefit of the plaintiff even though a creditor was the first beneficiary, the plaintiff could proceed absent a plea of misjoinder by the defendant. The key to the holding is that if the creditor was not satisfied, then the plaintiff would have a direct loss.

In the case at bar, the plaintiff Carolyn Miller had no beneficial interest in the policy. The sole right to recover belonged to Marvin R. Miller, Sr. Thus, rather than a mere technicality, substantive rights were involved. Carolyn Miller alleged an interest as a beneficiary under the policy. This interest was denied by the insurer. She failed to meet the burden of showing her right to recover and directed verdict against her should have been sustained.

4. The Court Erred In Allowing Tape Recorded Telephone Conversation Into Evidence, Which Error Was Magnified By Then Also Allowing A Transcript Of The Conversation Into Evidence.

The plaintiffs and their attorney tape recorded a telephone conversation with Lavern Dillon. The recording was made without his knowledge or permission. The recording was made at a time when the appellant was attempting to make a determination as to whether the claim was meritorious. In *J.C. Penney Co., Inc., v. Blush,* 356 So.2d 590 (Miss. 1978), the Supreme Court quoted with approval from Formal Opinion 337 of the ABA Committee On Ethics and Professional Responsibility:

> "With the exception noted in the last paragraph, [extraordinary circumstances where the Attorney General or one acting under his discretion may use secret recordings] the Committee concludes that no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation." 356 So.2d at 594.

During the conversation, Mrs. Miller asked what would undoubtedly be considered leading questions of the unsuspecting Dillon; and then he was called by them as an adverse witness. Appellant was prevented from asking him questions because Dillon and National Life wished to use him during their case in chief. At the conclusion of their case, appellees then basically confessed motion on his behalf for a directed verdict.

While appellant strongly feels that admitting the tape recording into evidence constituted reversable error, the recording clearly established appellant's claim that appellees knew that Lavern Dillon was not being completely candid with National Life. In such circumstances, appellant urges this Court to recognize that a third party who knows

that an agent is not being completely candid with his principal cannot profit from his superior knowledge.

5. Certain Procedural Errors Justify Reversal.

Appellant agrees that ordinarily the discretion of the trial judge controls whether a witness will be allowed to testify in violation of the rule concerning sequestration of the witnesses. It should be pointed out in the case at bar that the request that the rule be invoked was made by appellees who then proceeded to call Lavern Dillon as an adverse witness. After he testified and appellees rested their case, they basically confessed motion for a directed verdict as to him.

Of more concern to appellant are the inflammatory remarks made by the attorney for appellees. Appellant made objections, and these objections were overruled by the trial court. For example, there simply was no logical basis for appellees' attorney to make the statement about being offended which is quoted on page 22 of appellant's brief. When appellant requested the court to instruct the jury to disregard this statement, this request was refused.

Contrary to that stated by appellees in their brief, appellees were allowed to open up new areas of inquiry during their rebuttal interrogation of Mrs. Miller. These questions were leading and were improper, and objections thereto should have been sustained. Taken as a whole, these procedural errors justify reversal for a new trial.

6. Certain Instructions Granted To The Plaintiffs Constituted Error.

Appellant strongly believes that instruction P-7 constituted error. This instruction required appellant to prove misrepresentation concerning past medical treatment by clear and convincing evidence. Appellant admits that the burden of proving the affirmative defense of misrepresenta-

tion is upon it. However, the proper test of establishing this affirmative defense is the "preponderance of the evidence" standard rather than the standard requiring "clear and convincing evidence." Appellees cite the case of *Interstate Life and Accident Ins. Co. v. Smith,* 260 So.2d 453 (Miss. 1972), in support of their instruction; but this case dealt solely with a statement concerning age.

Appellant also objected to instruction P-1 (A. 18) which constituted in effect a peremptory instruction. Lavern Dillon and Joe Blount testified that Carolyn Miller gave a false answer to question requiring information as to whether an insured had been treated by a doctor or hospitalized within five years. She testified to the contrary. Undisputed testimony by appellant's vice president established that an affirmative answer to this question would have resulted in further inquiry which would have discovered the extent of the young child's difficulties. The lawsuit boiled down to a question of fact between these witnesses. It is undisputed that Carolyn Miller did mention that the child was born with a heart murmur and that Blount and Dillon did not report this on the application. Their explanation was that a heart murmur was an insignificant thing, particularly when no treatment has been necessary for more than five years. However, P-1, as given, states that if they did not correctly write down the answers to any questions on the application, the company could not invalidate the policy regardless of whether appellees had been guilty of major misrepresentations. At one point, Dillon did state that Mrs. Miller had correctly answered Question No. 24; but he stated that this was a mistake on his part and that she did give a negative answer to Question No. 24 (A. 7).

Appellant has cited a general law holding that a third party dealing with an agent who knows that the agent is not being candid with the principal cannot take advantage of his superior knowledge, and that in such cases knowledge to the agent is not knowledge to the principal. It is un-

disputed that appellees were told by Dillon to give appellant a different version of the interview than the version being given by him. This was the basis for objecting to instruction P-8 which advised the jury that knowledge to the agent constituted knowledge to the company.

Appellees attempt to justify refusal of requested instruction D-11 by stating that it is similar to instruction D-10 which was granted. The difference is that D-11 would have informed the jury that any statement made by Mrs. Miller must be true regardless of whether she believed the statement to be true. This instruction is supported by the holding of this Court in *Prudential Insurance Co. of Am. v. Estate of Russell,* 274 So.2d 113 (Miss. 1973), and was important because Mrs. Miller stated that all she knew about her son's condition was that he had a "heart murmur" (A. 8). It was a necessary instruction in view of the instruction P-7 granted to the plaintiffs which required the defendant to prove that the plaintiffs "willfully" supplied fraudulent responses.

It is difficult to understand appellees' argument concerning failure of the court to grant D-13. This instruction advised the jury that punitive damages are not favored by the law and are to be given only in cases in which the actions of the defendant are such that he should be punished in order to deter others from similar actions (A. 22). This instruction is supported by numerous cases including *Standard Life Ins. Co. of Indiana v. Veal,* supra. Appellees justify refusal to grant this instruction by stating that P-3 was granted and correctly stated the law concerning punitive damages. The reading of this instruction indicates to the jury that punitive damages should be awarded as a matter of course, and appellant attempted to show that they should be granted only in cases where punishment is required. Thus, appellees were given an instruction favoring the award of punitive damages and appellant was denied the opportunity of showing that such damages are not favored by the law.

7. Improper Closing Arguments Were Made By Attorney For Plaintiffs.

It is respectfully submitted that the size of the punitive damages judgment in relationship to the size of the actual damages awarded is evidence of passion and prejudice. Appellant obtained bill of exceptions in order to get into the record some of the more inflammatory remarks made by appellees' counsel. These remarks were in no way intended to assist the jury in evaluating the evidence, understanding the law, and applying the law to the facts. Instead, they were blatant appeals to passion and prejudice and were not supported by any evidence. In addition, the attorney for appellees informed the jury that they "ought to be sick" of "insurance companies ripping people off". It is improper to ask the jury to inject their own personal feelings into the controversy. The remarks were objected to; the objections were overruled; and motion for mistrial was, likewise, made and overruled.

8. The Amount Of The Punitive Damages Award Was Excessive.

The appellant strongly feels that this is not a case in which punitive damages should be awarded. If mistaken in this contention, however, it is submitted that there must be some rational basis between the size of the punitive damages award and the amount of actual damages sustained. It is further submitted that award of $350,000.00 punitive damages based upon actual damages in the amount of $2,500.00 is excessive.

Appellant, therefore, respectfully submits that the case at bar should be reversed and rendered as to both punitive and actual damages. If mistaken in the above, then the case should be rendered as to punitive damages and a new trial granted on the question of actual damages. If mistaken in this, then new trial should be granted on the issue of the amount of punitive damages.

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CERTIFICATE

A true copy of the foregoing Reply Brief of Appellant has been mailed, postage prepaid, to the Honorable Michael B. McMahan, Post Office Box 31, Hattiesburg, Mississippi 39401, attorney for appellees; Honorable Jack B. Weldy, Post Office Box 43, Hattiesburg, Mississippi 39401, former Circuit Judge, Twelfth Judicial District; and Honorable Richard McKenzie, Post Office Box 1403, Hattiesburg, Mississippi 39401, Circuit Judge, Twelfth Judicial District, on this 1st day of July, A.D., 1983, which is more than two days before the filing of said reply brief.

/s/ S. WAYNE EASTERLING
S. Wayne Easterling

APPENDIX L

IN THE CIRCUIT COURT OF
LEE COUNTY, MISSISSIPPI

No. 18,556

LIFE & CASUALTY INSURANCE COMPANY
OF TENNESSEE

Plaintiff

VS.

EDWARD BRISTOW

Defendant

SPECIAL INTERROGATORIES

You, the jury should answer the rest of the questions in sequence as instructed here. Please answer the first two questions:

1. Do you believe based upon a preponderance of the evidence that Mr. Bristow was able to perform any [type of] occupation [or profession] for which he was reasonably suited by education, training or experience on March 9, 1982?

YES ———

NO —✓—

2. Do you believe based upon a preponderance of the evidence that Mr. Bristow is able to perform any [type of] occupation [or profession]* for which he is reasonably suited by education, training or experience now?

---

* The bracketed words appeared in the draft Special Interrogatories to the jury submitted to the court by appellant. The court deleted the bracketed words before the Special Interrogatories were submitted to the jury for its responses and verdict.

YES ————

NO —✓—

If you answer both questions 1 and 2 above yes, then you should not consider any further questions and you should return these questions as your verdict. If you answer question No. 1 above NO, then you should answer the following question.

3. Do you believe based upon a preponderance of the evidence that Life & Casualty Insurance Company of Tennessee had an arguable or legitimate reason for terminating Mr. Bristow's benefits on March 9, 1982?

YES ————

NO —✓—

If you answer YES to the preceding question, then you should not answer any more questions and you should return these answers as the verdict of the jury. If your answer is NO, then you should answer the following question.

4. Do you believe based upon a preponderance of the evidence that Life & Casualty Insurance Company of Tennesee's termination of benefits constituted a willful and intentional wrong *or* constituted such gross or reckless negligence as to be equivalent to such a wrong?

YES —✓—

NO ————

If you answer NO to the preceding question, then you should not answer any more questions and you should return these answers as the verdict of the jury. If you answer YES, then you *may* in your discretion award damages as *otherwise* instructed by the court and the form of your verdict shall be in the following form:

We, the jury, find for Edward Bristow in the amount of $———— actual damages.

or

We, the jury, find for Edward Bristow in the amount of $50,000.00 actual damages and $6,000,000.00 punitive damages.

Supreme Court, U.S.
FILED
APR 29 1986
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CLERK

No. 85-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY,
Appellant,

v.

CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.,
Appellees.

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
ARGUMENT	5
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:

Aetna Life Ins. Co. v. Lavoie, slip op. at 14 (No. 84-1601, April 22, 1985)	9
Barr v. City of Columbia, 375 U.S. 147, 149 (1964)	7
Collins v. North Miss. Sav. & Loan Ass'n, 445 So. 2d 828, 832 (Miss. 1984)	7
Cunningham v. Cunningham, 423 So. 2d 136 (Miss. 1982)	7
Hathorn v. Lovorn, 457 U.S. 255 (1982)	7
Lumberman's Mut. Cas. Co. v. Rhodes, 459 So. 2d 244, 246 (Miss. 1984)	7
McGolderick v. Compagnie Generale Transatlantique, 309 U.S. 430, 434 (1940)	9
Peoples Bk. & Trust Co. v. L & T Developers, Inc., 437 So. 2d 7 (Miss. 1983)	8
Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945)	5
South Cent. Bell v. Adson, 474 So. 2d 584 (Miss. 1985)	7
Wallace v. Jones, 360 So. 2d 932 (Miss. 1978)	8
Webb v. Webb, 451 U.S. 493, 499 (1981)	9

STATUTES AND RULES:

Miss. Code Ann. § 11-3-23 (Supp. 1982)	5, 6
Rule 14, Mississippi Supreme Court	1, 6, 7

TREATISES:

A. TOBIAS, THE INVISIBLE BANKERS 258-9 (1982)	1
16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FED. PRAC. & PROC. 4022 at 701 (1977)	5, 8

IN THE

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AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY,

Appellant,

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CAROLYN MILLER AND MARVIN RAMSEY MILLER, SR.,

Appellees.

On Appeal from the Supreme Court of Mississippi

MOTION TO DISMISS

Pursuant to Rule 16.1(b), Appellees move to dismiss this appeal on the ground that the federal questions sought to be reviewed were not timely and properly raised before the Supreme Court of Mississippi.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 14, Mississippi Supreme Court.

PETITION FOR REHEARING

(a) Within fifteen (15) days after a decision is handed down on the merits of a case or on a motion, any party asserting that an error of law or fact was committed may file a written petition for rehearing, [and] . . . shall briefly and distinctly set forth its

grounds. The petition for rehearing shall be accompanied by a brief in support thereof . . . .

STATEMENT OF THE CASE

Appellant is a debit insurance company.[1] In 1981 it had a net worth of $470,000,000 and net profits for that fiscal year of $134,000,000. The typical policy issued is for a small amount and the typical insured is a person of low income who has never purchased insurance before.

Carolyn and Marvin Miller fit the pattern. Neither possesses a high-school education, and they live a life best described as on the edge of a marginal economic base. When solicited by two agents of Appellant (Messrs. Dillon and Blount), Mrs. Miller orally responded to questions concerning the health of her child by explaining that he had a heart murmur. The agents, however, omitted this information from the application form they

---

[1] The history and current status of this industry has been recently reviewed:

> [With respect to debit insurance] [t]hese are tiny face-amount policies, still sold in some of America's poverty pockets . . . . Under the terms of these whole life policies, an insurance agent comes by in person, weekly, to collect the 50 cents or dollar that is due, checking off payments in his debit book. For the poor who could save in no other way, it was argued, this was worthwhile insurance. Yet these policies were, and are, grotesquely inefficient. Of each dime "saved," perhaps a penny went to pay the actual cost of insurance, and a penny or two more built up "cash value"—but most of the dime went to expenses, overhead and profit. Horror stories abound of families being sold five and ten such penny-rate policies—on the lives of their children, no less, instead of their breadwinner —when the coverage was not needed, or when the same dollars, combined to purchase a single term policy, could have purchased five or ten or twenty times more coverage . . . . There were still 98 million home-service life insurance policies in force in 1980 (. . . 36 million [of which are] monthly debit plans), with an average face value of less than $1,600 each.

[A. TOBIAS, THE INVISIBLE BANKERS 258-9 (1982)].

prepared and forwarded to the Appellant. Subsequently, following the child's death, Appellant refused to pay the policy amount ($2,500) to the Millers on the basis of "false statements" on the application. The practices of Appellant uncovered at the trial in which the jury awarded $2,500 in actual damages and $350,000 in punitive damages elicited the following analysis from one Justice of the Mississippi Supreme Court:

> In all likelihood Dillon's and Blount's sole source of income from National Life was on commission. Furthermore, their largest commission came from the initial premium paid on an insurance policy.
>
> If the policy was issued following the application, they kept the commission. If the policy was not issued, the premium had to be refunded.
>
> When the soliciting agent, rather than the applicant fills in the application, it is naive to assume there is not a strong temptation on his part to ignore an answer the applicant gives which would prevent the company's issuing a policy, which would "knock out" a sale.
>
> The insurance companies surely know this. Yet, they permit their agents to be put in such conflict of interest positions, only to assert later, with a presumably straight face, that precisely what happened in this case should never occur.
>
> Not only this, having approved a system of practice which encourages giving false answers (by their own agents) to questions on their application forms, they use the deceit of their own employees as a weapon to deny a claim.
>
> It would be quite simple to remove from the agent any responsibility or authority to fill in the application form. The question then follows, why don't insurance companies do so?
>
> The answer, for insurance companies such as this defendant, is not savory.

> . . . Did National Life know, or have any reason to know, that Blount and Dillon had been told by Mrs. Miller that her son had a heart problem when the application was taken? When she made the claim for her son's death, she told the company she had told Dillon and Blount the truth. Yet the company waited eleven months after rejecting her claim, and just two weeks before trial before it ever so much as questioned Dillon and Blount, its own employees, about the circumstances surrounding the application.
>
> . . . National Life could play the odds with its practice of encouraging agents to submit false applications and then be able to deny a claim because the application was false. In this case National Life has played the odds and lost.
>
> A punitive damages award in this case is quite proper. Again, a court has been called upon to redress grievances which could be avoided by proper state regulation of insurance company practices.

[Jurisdictional Statement 20a-21a].

After the jury's verdict was entered, Appellant filed a "Motion for Judgment, Corrected Judgment, or New Trial." Grounds for setting aside the punitive damage award were limited to the following:

> That the verdict of the jury is against the overwhelming weight of the testimony and there is no testimony whatsoever to justify a verdict for punitive damages.
>
> . . . .
>
> That, if the plaintiffs were entitled to recover anything whatsoever in the cause, which is denied, the verdict is excessive and evidences that the jury was biased and prejudiced against said defendant.

[*Id.* at 71a].

The motion was denied. Appeal to the Mississippi Supreme Court followed. In its brief to the court,

Appellant confined its argument on the punitive damages issue to the contention that it was "excessive" under applicable Mississippi decisions. *Id.* at 109a-110a, 123a. Following affirmance and imposition of the mandatory fifteen percent appeal penalty pursuant to Miss. Code Ann. § 11-3-23 (Supp. 1982), *id.* at 22a, Appellant filed a petition for rehearing. This document raised, for the first time, the issue of whether the 15% penalty provision violated the Fourteenth Amendment.[2] The *only* basis for reconsideration of the punitive damage award, on the other hand, was limited to the following contention:

> A party making an unsuccessful factual defense should not be subjected to a punitive damage instruction.

[*Id.* at 26a].

Thereafter, in a discrete portion of its brief in support of the petition for rehearing, Appellant inserted one sentence in which reference was made to a violation of the Eighth Amendment and/or "due process rights." *Id.* at 32a. Following denial of rehearing without opinion, Appellant now comes to this Court arguing that plenary review of all constitutional issues "raised" and "rejected" on rehearing is in order.

ARGUMENT

The Eighth Amendment and Due Process Issues:—The general rule, of course, is that "[q]uestions first presented to the highest State court on a petition for rehearing come too late for consideration" by this Court. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 128 (1945); 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FED. PRAC. & PROC. § 4022 at 701 (1977). While Appellant attempts to bring its case within excep-

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[2] As pointed out, Appellant also raised the issue in a Motion to Correct Mandate. Jurisdictional Statement 3.

tions to this rule, its analysis fails to deal with one serious problem: the petition for rehearing did not raise any constitutional claim with respect to the punitive damage award.[3]

Rule 14 of the Mississippi Supreme Court requires the filing of *two* documents at the rehearing stage: a petition which "briefly and distinctly set forth its grounds," and a "brief in support thereof." As noted in the statement of the case, the *only grounds* asserted in the *petition* for the granting of a rehearing alleged a violation of state law, *i.e.*, "[a] party making an unsuccessful factual defense should not be subjected to a punitive damage instruction." Having failed to "distinctly set forth" any constitutional deficiency with respect to the punitive damage award in its petition (as compared to the sentence reference found in the brief in support thereof), the issue is not appropriate for full review by this Court.

Mississippi's Penalty Provision and the Equal Protection Challenge:—Section 11-3-23 is a mandatory provision, *i.e.*, "the Supreme Court *shall* render judgment against the *appellant* for damages at the rate of fifteen percent . . . ." (emphasis added). This fact has led the Mississippi Supreme Court to make the following proposition clear to all members of the bar:

> Every losing litigant is given an automatic right of appeal. When deciding whether to exercise that right, the penalty statute is there for him to consider. If he is successful on his appeal, of course, he incurs no penalty. *If he loses, however, he must pay the price, a price he well knows and may easily calculate before giving his notice of appeal.*

---

[3] Appellant apparently has reached the same conclusion. *See, e.g.*, Jurisdictional Statement 10 (requesting a "hold" on the case pending disposition "of any other cases . . . which . . . may be suitable for decision of [*sic*] the Excessive Fines Clause" in order that the perceived "new constitutional rule" can be applied to the case.

[*Collins v. North Miss. Sav. & Loan Ass'n*, 445 So. 2d 828, 832 (Miss. 1984) (emphasis added)].

Appellant had adequate notice of the proposition that if the trial court's judgment was affirmed, the penalty would automatically attach. The fifteen percent penalty of Section 11-3-23 is imposed unless the appeal is successful and an appellant's only defense is to contest the statute's applicability (on constitutional or other grounds) on appeal. This is *exactly* the technique employed by counsel in previous cases. *Cunningham v. Cunningham*, 423 So. 2d 136, 138 (Miss. 1982) (court directly addresses question on appeal as to whether appellee was entitled to statutory damages); *Collins v. North Miss. Sav. & Loan Ass'n*, *supra* at 831 (addressing applicability of 11-3-23 on appeal). *See also South Cent. Bell v. Adson*, 474 So. 2d 584 (Miss. 1985) (direct appeal; decision that 15% penalty was applicable to employer in worker's compensation case); *Lumberman's Mut. Cas. Co. v. Rhodes*, 459 So .2d 244, 246 (Miss. 1984) (direct appeal; determination that funds were subject to penalty).

Appellant argues, however, that there is precedent for the proposition that the Mississippi Supreme Court entertains post-judgment motions by unsuccessful appellants attacking the statute's constitutionality. As a general proposition, the fact that a state supreme court employs its equitable powers in certain instances to grant petitions for rehearing has no bearing on this Court's rule precluding review of questions first raised in this manner.[4] Even more important, however, the

[4] Appellees agree with Appellant's apparent conclusion that this Court's decision in *Hathorn v. Lovorn*, 457 U.S. 255 (1982), has no bearing on the correct disposition of the instant case. First, there is no argument that petitions for rehearing with respect to Section 11-3-23 have not been handled "evenhandedly." *Id.* at 264. Second, this Court's citation to *Barr v. City of Columbia*, 378 U.S. 147, 149 (1964), indicates that *Hathorn* is a decision compatible with the

case relied upon by Appellant, *Wallace v. Jones*, 360 So. 2d 932 (Miss. 1978), involves a situation in which a successful *appellee* filed a post-decision motion contending that the court was in error by *not* complying with the mandatory statutory obligation to impose the penalty. It is in this limited context, *and only this context*, that the Mississippi Supreme Court has entertained arguments on *rehearing* (including those of a constitutional dimension) by appellants that the penalty should not be imposed. *See also, Peoples Bk. & Trust Co. v. L & T Developers, Inc.*, 437 So. 2d 7 (Miss. 1983) (motion for assessment of statutory damages entertained; defense by opposing party based on, among other things, constitutional grounds).

This line of decisions establishes the following precedent. First, those deciding to appeal are on notice that an affirmance will result in the assessment of the penalty if the case falls within the coverage of Section 11-3-23. Second, inasmuch as the penalty is mandatory, all arguments relating to its inapplicability must be presented on appeal. Third, absent a decision to attack the statute on appeal, the *only* remaining opportunity to contest the mandatory penalty on constitutional grounds arises only if all three of the following have occurred: (1) the Mississippi Supreme Court affirms the trial court's decision;

---

proposition that state procedural rules that are "deliberately applied to avoid consideration of federal rights" will not preclude review by this Court. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FED. PRAC. & PROC. § 4028 at 429 (Supp. 1985). See also *id.* at 431 (*Hathorn* may have been decided because of "an unspoken fear that the state court was applying its rehearing limits so as to discriminate against federal rights.") Third, *Hathorn* can be read to provide an exception to the general rule against review of questions presented for the first time in a petition for rehearing with respect to issues "that the parties could have foreseen but that [arise] with urgency" only after a court upholds part of a challenged statute. 457 U.S. at 264. This, of course, is not the procedural posture of the instant case.

(2) the judgment entered fails to award the penalty; and (3) the *appellee* files a proper motion contending that error has been committed. It is at this point that *Wallace v. Jones* supports the proposition that a constitutional challenge by an appellant in the form of a response may be sufficient to permit the Court to entertain the argument.

In *Aetna Life Ins. Co. v. Lavoie*, slip op. at 14 (No. 84-1601, April 22, 1986), this Court concluded that the issue of mandatory assessments of percentage penalties against unsuccessful appellants raises an important issue "which, in an appropriate setting, must be resolved . . . ." An "appropriate setting" is obviously not one in which the issue is not raised and argued on appeal and is brought to the attention of a state supreme court in a petition for rehearing. Time and again this Court has recognized that "due regard for the appropriate relationship [with] . . . state courts requires [it] to decline to consider and decide questions affecting the validity of state statutes not urged or considered there." *McGolderick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). As emphasized in *Webb v. Webb*, 451 U.S. 493, 499 (1981):

> There are powerful policy considerations underlying the . . . rule that the federal challenge to a state statute . . . be presented first to the state courts. Those considerations strongly indicate that we should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below.

The presence of an adequate and independent state ground in the instant case precludes review.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed.

Respectfully submitted,

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5/15 Conf. p. 11

(3)

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Appellees.

On Appeal from the Supreme Court of Mississippi

MOTION OF APPELLANT TO DEFER CONSIDERATION

---

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4 pp

MOTION OF APPELLANT TO DEFER CONSIDERATION

This appeal is presently scheduled for consideration at the Court's May 15, 1986 conference. Appellant respectfully moves the Court to defer consideration of this appeal until its conference on June 19, 1986, at which time this appeal can be considered together with at least one other appeal raising similar or identical issues.

This appeal presents an Equal Protection Clause challenge to Mississippi's fifteen percent appeal penalty statute, *Miss. Code Ann.* § 11-3-23 (Supp. 1982). This challenge is substantively indistinguishable from the challenge to Alabama's ten percent appeal penalty statute before this Court in *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (*cert. granted*, Mar. 24, 1986). The appeal in this case also presents a challenge to a $350,000 punitive damage award under the Excessive Fines Clause and the Due Process Clause of the Fourteenth Amendment.

Both of these questions are also presented in *Bankers Life and Casualty Co.* v. *Crenshaw*, No. 85-1765. *Crenshaw* was docketed in this Court on April 25, 1986; the Jurisdictional Statement was received by counsel for appellee Crenshaw on or about April 28, 1986. Therefore, appellee Crenshaw's motion, if any, is due to be filed on or about May 28. Under this Court's rules, *Crenshaw* would be circulated on June 3 and considered at the Court's June 19 conference.[1]

---

[1] Appellant's counsel herein, also counsel for the appellant in *Crenshaw*, have been informed by the Office of the Clerk that extensions of time to respond are not presently being granted

In its opinion in *Aetna Life Insurance Company* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986), this Court observed that Questions 1 and 4 presented in *Aetna*—which do not differ materially from the questions presented in this appeal and *Crenshaw*—"raise important issues which, in an appropriate setting, must be resolved . . . ." Slip op., at 14. Because this case raises the identical two issues raised in *Crenshaw* which have been characterized in this fashion by the Court in *Aetna*, appellant believes that it would be useful for the Court to consider the *Miller* and *Crenshaw* appeals together since both appeals are due to be considered this Term. Appellant therefore respectfully moves this Court to defer consideration of this appeal to this Court's conference on June 19, 1986 or to its conference on June 26, 1986 if the latter conference would be more appropriate.[2]

---

beyond May 31 in order to ensure that cases which would otherwise be ready for consideration this Term are not delayed. Appellant assumes this practice will be adhered to in *Crenshaw*, particularly in light of the fact that appellee Crenshaw has been fully on notice of appellant's intention to docket this appeal since the filing by appellant of an Application for Stay in this Court on March 12, 1986 (A-694).

[2] The questions presented in *Miller* and *Crenshaw* are also presented in the appeal in *Treadwell Ford, Inc.* v. *Campbell, et al.*, No. 85-1799, which was docketed on May 7, 1986. Without any extensions of time, that appeal would be ready for consideration at the Court's June 26, 1986 conference, the appellee's motions being due by June 9, 1986. Appellant's counsel herein, also counsel for appellant Treadwell Ford, Inc. in No. 85-1799, have been informed by the Office of the Clerk that the Court may not consider and dispose of new cases at its June 26 conference. The Court may, in that event, wish to advance its consideration of *Treadwell Ford, Inc.* to its June 19 conference.

May 8, 1986

Respectfully submitted,

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MAY 15 PAGE -11

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Appellees.

On Appeal From The Supreme Court of Mississippi

REPLY MEMORANDUM

---

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
1. Presentation of the Federal Constitutional Challenge to the Punitive Damage Award	2
2. Presentation of the Federal Constitutional Challenge to *Miss. Code Ann.* § 11-3-23 (Supp. 1982)	5
CONCLUSION	8

TABLE OF AUTHORITIES

CASES: Page

Aetna Life Insurance Co. v. *Lavoie*, No. 84-1601 (April 22, 1986) 1

Affholder, Inc. v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984) 6

Bankers Life and Casualty Co. v. *Crenshaw*, No. 85-1765 (appeal docketed April 25, 1986) 8

Barr v. *City of Columbia*, 378 U.S. 146 (1964) ... 3

Burlington Northern R. Co. v. *Woods*, No. 85-1088 (*cert. granted*, March 24, 1986) 6

Central of Georgia Railway Co. v. *Steed*, 287 Ala. 64, 248 So.2d 110 (1971) 6

Collins v. *North Mississippi Savings and Loan Association*, 445 So.2d 828 (Miss. 1984) 6

Cunningham v. *Cunningham*, 423 So.2d 136 (Miss. 1982) 7

Dewey v. *Des Moines*, 173 U.S. 193 (1899) 2

Hathorn v. *Lovorn*, 457 U.S. 255 (1982) 2, 3, 5

Illinois v. *Gates*, 462 U.S. 213 (1983) 6

Lumbermens Mutual Casualty Co. v. *Rhodes*, 459 So.2d 244 (Miss. 1984) 7

South Central Bell Telephone Co. v. *Aden*, 474 So.2d 584 (Miss. 1985) 7

Tigner v. *McGehee*, 60 Miss. 242 (1882) 5

Treadwell Ford, Inc. v. *Campbell*, A-749 8

Wallace v. *Jones*, 360 So.2d 932 (Miss. 1978) 5, 7

Walters v. *Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984) 6

CONSTITUTION, STATUTES AND RULES

UNITED STATES CONSTITUTION:

Eighth Amendment, Clause 2 (Excessive Fines Clause) ..... *passim*

Table of Authorities Continued

Page

Fourteenth Amendment, Section 1 (Due Process Clause) ..... *passim*

Fourteenth Amendment, Section 1 (Equal Protection Clause) 1, 8

STATE STATUTES AND RULES

Section 11-3-23, *Mississippi Code Annotated* (Supp. 1982) 5, 6, 7

Rule 14, Rules of the Supreme Court of Mississippi (1983) 3, 4

Rule 33, Rules of the Supreme Court of Mississippi (1983) 4

Section 12-22-72, *Code of Alabama* (1975) 6, 8

REPLY MEMORANDUM

INTRODUCTION

Appellees' Motion to Dismiss ("Motion") advances arguments which were generally anticipated and addressed in appellant's Jurisdictional Statement ("Juris. Stat."). Accordingly, this Reply will correct various mischaracterizations and unwarranted inferences by appellees concerning the facts of record and Mississippi law and practice regarding the proper presentation of federal questions.

In their Motion, appellees concede, as they must in light of this Court's recent opinion in *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (April 22, 1986), that the federal constitutional questions presented in this appeal are substantial. As this court stated in *Aetna*, the questions presented in this case—the unconstitutionality of the punitive damage award under the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment, and the unconstitutionality of Mississippi's mandatory appeal penalty statute under the Equal Protection Clause—"raise important issues which, in an appropriate setting, must be resolved . . . ." *Id.*, slip op., at 14.[1]

Instead, appellees argue that neither of the federal questions presented in this appeal were properly presented to the court below. These arguments both distort Mississippi law and practice and ignore or misstate the relevance of clear contrary precedent in this Court.

---

[1] Appellees' "Statement of the Case" consumes nearly five pages with "facts" drawn for the most part not from the record but a library book and a portion of the opinion of the Supreme Court of Mississippi, both of which speculate on the possibilities for unethical practice in the insurance industry generally. The rather transparent emotional appeal and conjecture about appellant's motives and procedures in the conduct of its business from outside the record are irrelevant to the question of this Court's jurisdiction.

1. Presentation of the Federal Constitutional Challenge to the Punitive Damage Award

Appellees do not dispute that in post-trial motions and on direct appeal to the Supreme Court of Mississippi, Juris. Stat., at 8, appellant squarely challenged the excessiveness of the $350,000 punitive damage award. Nor do appellees contend that the "excessiveness" argument advanced again at the rehearing stage was somehow a "different" argument simply because at that stage appellant specifically relied upon the Eighth and Fourteenth Amendments in support of its "excessiveness" argument. Thus, appellees do not dispute that *Dewey* v. *Des Moines*, 173 U.S. 193 (1899), is controlling on the question of this Court's power to decide this question in this case.

Appellees presumably do not challenge appellant's reliance on *Dewey* because, even if the excessiveness challenge had not been raised post-trial and on direct appeal, it is clear that it could have been raised for the first time in the Supreme Court of Mississippi by post-affirmance motion and, under this Court's holding in *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982), would still be regarded as having been properly presented as regards this Court's jurisdiction.

In *Hathorn*, this Court considered and rejected the argument that a question raised for the first time by the petitioner at the rehearing stage and not addressed in the decision of the Supreme Court of Mississippi must be regarded as having been improperly presented. This Court, assuming that the denial of the petition for rehearing without comment could have constituted a decision that the presentation of that federal question came too late, nevertheless concluded that that federal question had been properly presented. This holding was based on the fact that the Supreme Court of Mississippi either has no rule against presentation of new federal questions at the rehearing stage or that, if it does, that rule was not "strictly or

regularly" followed, *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964), so as to provide a basis for depriving this Court of its power to review a substantial federal question. *Hathorn* v. *Lovorn*, 457 U.S., at 263. This Court concluded in *Hathorn* that the denial of rehearing in that case "must have rested either upon a substantive rejection of petitioners' federal claim or upon a procedural rule that the state court applies only irregularly." *Id.*, at 264-65 (footnote omitted).

In its opinion in *Hathorn*, this Court examined a number of cases in which the court below decided questions which had been raised for the first time at the rehearing stage. *Id.*, at 263-64 & n.14. Appellees do not even suggest that the court below has departed from its practice of entertaining and deciding questions raised for the first time at the rehearing stage. Instead, appellees make the facile argument that this substantial federal question cannot be considered by this Court because this federal question was not, as allegedly required by Rule 14 of the court below, "distinctly set forth" in appellant's Petition for Rehearing. Thus, appellees urge that this Court must assume that this question could not have been entertained by the court below.[2]

On November 26, 1985, appellant filed a "Petition for Rehearing" in which it set forth, in five numbered sentences, its grounds for seeking a rehearing. J.S. App., at 26a. Those five numbered sentences were taken verbatim from the five headings found in appellant's Brief in Sup-

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[2] In advancing this argument regarding the alleged deficiencies in appellant's petition, appellees conveniently ignore the fact that, without regard to the petition itself, the excessiveness of the punitive damage award had already been expressly challenged on direct appeal to the Supreme Court of Mississippi. Juris. Stat., at 109a-110a. Appellees cannot escape the fact that the excessiveness of the punitive damage award has been hotly contested from the time that award was made by the jury.

port of Petition for Rehearing filed that same day. J.S. App., at 30a, 32a, 33a, 34a and 35a. It is the apparent position of appellees that the language chosen by appellant to capture the essence of its challenge to the excessiveness of the punitive damage award set forth under heading "A" in its Brief in Support of Petition for Rehearing, J.S. App., at 30a, was either inartful or otherwise deficient. In support of this transparently frivolous argument, appellees cite no case interpreting Rule 14, much less a case holding, or even remotely suggesting, that the words "briefly and distinctly set forth the grounds" in Rule 14 require lawyers practicing in Mississippi to select a particular combination of words by which to describe the bases on which they seek rehearing. Nor do appellees cite a single case in the court below suggesting that failure to choose the "right" words in a Petition for Rehearing—even assuming such a choice were required by Rule 14 and even if appellant could be thought to have selected the "wrong" words—could ever deprive the court below of its power to entertain and decide issues identified more fully and briefed in the required accompanying brief in support of that petition. Nor do appellees attempt to articulate any substantial, or even insubstantial, state purpose which might be served by the issuance of a rule which would achieve the result urged by appellees.[3] Rule 14 does not achieve such a result in this case, nor has it ever led to such a result in any reported or unreported case of the court below brought to this Court's attention by appellees or known to appellant.

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[3] Mississippi, like most other States, has largely abandoned highly technical rules of pleading. Rule 33 of the rules of that court expressly provides that the "design [of the Rules] is to facilitate business and advance justice . . . ." The interpretation placed on Rule 14 by appellees on the facts here would do neither.

2. Presentation of the Federal Constitutional Challenge to Miss. Code Ann. § 11-3-23 (Supp. 1982)

As discussed above, this Court has squarely determined that the Supreme Court of Mississippi has no practice of refusing to entertain questions presented for the first time at the rehearing stage. *Hathorn* v. *Lovorn*, 457 U.S., at 263-65. Indeed, if that court has a "strictly or regularly" followed practice, it appears to be to consider and resolve issues presented for the first time in petitions for rehearing. *Id.*, at 263 n.14.[4] *Hathorn* would thus appear to be dispositive of appellees' contention that appellant's challenge to the constitutionality of Mississippi's appeal penalty statute had to be raised on direct appeal before the judgment was affirmed by the court below.

Passing this point, appellees do not, because they cannot, cite a single case in the court below which suggests that a question involving § 11-3-23 is not timely presented at the rehearing stage.

Since at least 1882, the Supreme Court of Mississippi has recognized that questions regarding the implementation of § 11-3-23 and its predecessor statutes are appropriately raised by way of a post-affirmance motion in that court. *Tigner* v. *McGehee*, 60 Miss. 242 (1882). The court below entertained and rejected in post-affirmance proceedings an identical federal constitutional challenge to § 11-3-23 in *Wallace* v. *Jones*, 360 So.2d 932 (Miss. 1978). No case in the court below suggests that this challenge to §11-3-23 was not timely presented as a matter of state law. The same is true in every other court which has been

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[4] The holding in *Hathorn* that no Mississippi procedural bar could be invoked to preclude this Court's jurisdiction is in no way qualified, in the opinion of Justice O'Connor for the Court, by the several meaningless distinctions appellees attempt to draw, Motion, at 7 n.4. The holding of *Hathorn* is that the Supreme Court of Mississippi does not itself regularly invoke such a procedural bar on any sufficiently regular basis, if indeed such a bar even exists.

called upon to apply § 11-3-23 or its Alabama counterpart, § 12-22-72, *Code of Alabama* (1975).[5] Thus, the failure of the court below expressly to rule on this federal constitutional challenge to § 11-3-23 in no way undermines this Court's appellate jurisdiction over this case. *See Illinois* v. *Gates*, 462 U.S. 213, 220 n.2 (1983).

Appellees' reliance on *Collins* v. *North Mississippi Savings and Loan Association*, 445 So.2d 828 (Miss. 1984), is misplaced. In that case, the Supreme Court of Mississippi affirmed a decree below which had dismissed a complaint alleging that an appeal had been taken in bad faith. Section 11-3-23 was not put in issue, and the court below enunciated no rule concerning the proper time for challenging the application of that statute.

The other cases cited by appellees are equally irrelevant to and unsupportive of their argument. None of those cases appears to have involved any challenge, on appeal or post-

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[5] Although the question when a challenge to § 11-3-23 must be raised in order to be considered by the court below is technically an issue of Mississippi law, appellant's assertion that such a challenge should be raised by post-affirmance motion is not only not contradicted by any case in the court below but is also recognized as appropriate by the only other court which has been called upon to apply § 11-3-23. Thus, the Fifth Circuit has entertained and decided in post-affirmance proceedings various questions arising out of application of § 11-3-23 to diversity cases coming to it on appeal from the federal district court in Mississippi. *See, e.g., Affholder, Inc.* v. *Southern Rock, Inc.*, 746 F.2d 305 (5th Cir. 1984) (on motion to assess damages for appeal; motion denied); *Walters* v. *Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984) (post-affirmance motion in district court to assess penalty; motion granted).

The same understanding also governs with respect to challenges to Alabama's virtually identical appeal penalty statute, § 12-22-72, *Code of Alabama* (1975), in both the Alabama courts, *see, e.g., Central of Georgia Railway Co.* v. *Steed*, 287 Ala. 64, 248 So.2d 110 (1971) (federal constitutional challenge in post-affirmance proceedings to § 12-22-72 decided against the challenge), and in the Eleventh Circuit, *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (*cert. granted*, March 24, 1986) (post-affirmance federal constitutional challenge denied *sub silentio*).

appeal, to the imposition of a penalty under § 11-3-23.[6] Even if these cases said what appellees contend they say—namely, that an appropriate "technique" to contest the imposition of the appeal penalty is on direct appeal—*at most* they would stand for the proposition that an appellant *may* elect to challenge the potential application of the appeal penalty statute prior to its actual imposition. Appellees do not point to a single line in any of these cases suggesting that an appellant *must* challenge the applicability of § 11-3-23 on direct appeal in order to be heard.

Neither can appellees summarily dispose of *Wallace* v. *Jones* on the ground that the federal constitutional challenge was raised by the appellant only after the appellee had sought to have the appeal penalty imposed. Motion,

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[6] *Cunningham* v. *Cunningham*, 423 So.2d 136 (Miss. 1982), for example, appears to have involved a request by the appellee for imposition of a penalty on appeal of a case from the county (trial) court to the circuit court. Because the Supreme Court of Mississippi found that no appeal was effectively taken below, much less affirmed, § 11-3-23 did not authorize statutory damages. There is no suggestion that appellee had raised the issue of the penalty at the time of the original appeal in anticipation that appellant would be unsuccessful.

In *South Central Bell Telephone Co.* v. *Aden*, 474 So.2d 584 (Miss. 1985), a workers' compensation case, the Supreme Court of Mississippi affirmed an order of the Workers' Compensation Commission. The court did impose a penalty pursuant to § 11-3-23, but there is nothing whatsoever in the opinion to suggest that it did so upon the request of the appellee, or that appellant challenged the application of the statute on its appeal. Rather, the court appeared to be implementing § 11-3-23 *sua sponte* as a natural consequence of the decision to affirm. 474 So.2d, at 598.

Similarly, while the Supreme Court of Mississippi imposed a penalty under § 11-3-23 in *Lumbermens Mutual Casualty Co.* v. *Rhodes*, 459 So.2d 244 (Miss. 1984), it also appears to have done so on its own motion as a consequence of the decision to affirm the judgment of the lower court in a garnishment proceeding. There is absolutely no suggestion in the opinion that the applicability or non-applicability of the statute was raised by either of the parties on appeal.

at 7-9. Appellees understandably do not suggest what state purpose might be advanced by such a rule, because there would be no purpose other than to require all litigants to brief every conceivable question regarding § 11-3-23 on direct appeal of cases in which that statute might have some possible application.

CONCLUSION

The jurisdiction of this Court over this case is well established by decisions of this Court and the court below. This case should be held for consideration together with the appeals in *Bankers Life and Casualty Company* v. *Crenshaw*, No. 85-1765, and *Treadwell Ford, Inc.* v. *Campbell*, A-749.[7]

May 1, 1986

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[7] *Bankers Life* presents both of the questions presented in this appeal and would also permit the Court to address the question whether the retrospective application of a newly formulated substantive rule of law violates the Contract Clause and Due Process Clause of the Fourteenth Amendment. *Treadwell Ford, Inc.* presents an Eighth and Fourteenth Amendment challenge to a punitive damage award pursuant to an Alabama statute interpreted by the Alabama courts to authorize punitive damages, as well as a challenge to Alabama's appeal penalty statute, § 12-22-72, *Code of Alabama* (1975). The Court may want to consider setting *Bankers Life* and *Treadwell Ford, Inc.* for argument in tandem in order to present the broadest range of considerations raised by these cases. Should the Court do so, this case should be held pending disposition of *Bankers Life* and *Treadwell Ford, Inc.*

Respectfully submitted

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